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No. 12568

United States
Court of Appeals
for the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

WARNER BROS. PICTURES, INC., CO-
LUMBIA PICTURES CORPORATION and
LOEW'S INCORPORATED,
Respondent.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 422)

Petition for Enforcement of Order of the
National Labor Relations Board

FILED

AUG 30 1950

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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National Labor Relations Board

United States of America
Before the National Labor Relations Board

Case No. 21-C-2505

In the Matter of

COLUMBIA PICTURES CORPORATION and
ASSOCIATION OF MOTION PICTURE
PRODUCERS, INC.,

and

JOSEPH CUCCIA.

Case No. 21-C-2562

In the Matter of

COLUMBIA PICTURES CORPORATION and
ASSOCIATION OF MOTION PICTURE
PRODUCERS, INC.,

and

IRWIN P. HENTSCHEL.

Case No. 21-C-2563

In the Matter of

REPUBLIC PRODUCTIONS, INC., and
ASSOCIATION OF MOTION PICTURE
PRODUCERS, INC.,

and

ROBERT AMES.

Case No. 21-C-2564

In the Matter of

WARNER BROS. PICTURES, INC., and
ASSOCIATION OF MOTION PICTURE
PRODUCERS, INC.,

and

L. G. BATCHELDER, PAUL De SANCTIS,
CARL H. GIDLUND, G. M. HAND, CHAS.
JENSEN, LEO LAMB, R. M. LORA, H. C.
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J. C. GOUDIE, CHAS. J. LARSON, FRED
SEWARD, B. KENNETH COFFEY and
WILLIS HOWE.

Case No. 21-C-2660

In the Matter of

WARNER BROS. PICTURES, INC., and
ASSOCIATION OF MOTION PICTURE
PRODUCERS, INC.,

and

J. HAROLD ROGERS.

Case No. 21-C-2662

In the Matter of

LOEW'S INCORPORATED and
ASSOCIATION OF MOTION PICTURE
PRODUCERS, INC.,

and

GEORGE I. GROTH and ROBERT L. SEL-
GRATH.

Case No. 21-C-2664

In the Matter of

TWENTIETH CENTURY-FOX FILM COR-
PORATION and ASSOCIATION OF
MOTION PICTURE PRODUCERS, INC.,

and

EUGENE V. MAILES.

Case No. 21-C-2665

In the Matter of

RKO RADIO PICTURES, INC., and
ASSOCIATION OF MOTION PICTURE
PRODUCERS, INC.,

and

FORREST McLONEY.

DECISION AND ORDER

On March 20, 1947, Trial Examiner Mortimer Riemer issued his Intermediate Report in the above-entitled proceeding, finding that certain of the Respondents had engaged in and were engaging in certain unfair labor practices¹ and recommending

¹The provisions of Section 8 (1) and 8 (3) of the National Labor Relations Act, which the Trial Examiner found certain of the Respondents had violated, are continued in Section 8 (a) (1) and 8 (a) (3) of the Act, as amended by the Labor Management Relations Act, 1947.

that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner further found that Respondent RKO had not engaged in the alleged unfair labor practices, and that certain other Respondents had not engaged in certain other alleged unfair labor practices and recommended that these allegations of the complaint be dismissed and that the complaint be dismissed as against Respondent RKO.

The Respondents, the Alliance and certain of the complainants² filed exceptions to the Intermediate Report and briefs in support of their exceptions. On July 13, 1948, upon request of the Respondents and the Alliance, and pursuant to notice, the Board, at Washington, D. C., heard oral argument. The Respondents, the Alliance, and certain of the complainants were represented by counsel and participated in the argument.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the

²Joint exceptions and briefs were filed on behalf of complainants Robert W. Ames, George M. Hand, Irwin P. Hentschel, Charles Jenson, Leo Leonard Lamb, Raymond M. Lora, Eugene V. Mailes, Jesse L. Sapp, John L. Selgrath, George Stoica, Jr., and William G. White. Complainants Robert N. Bonning and William J. Simpson each filed a letter, which has been considered as exceptions.

Intermediate Report, the exceptions and briefs, the contentions advanced at oral argument, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the exceptions and modifications set forth below.

1. We agree with, and adopt, the finding of the Trial Examiner that Respondent Association is an employer within the meaning of the Act.³

2. We are of the opinion that the Trial Examiner correctly denied the Respondents' motion to dismiss the complaint insofar as it alleged discrimination against Seward, Coffey, Howe, and Stanley, on the ground that no charge had been filed on their behalf. There is ample authority to the effect that the contents of the charge do not limit the scope of the complaint, and that a respondent is not prejudiced by failure of the charge to include particular unfair labor practices later litigated so long as the respondent had ample notice and opportunity to defend.⁴

³Matter of Association of Motion Picture Producers, Inc., et al., 79 N. L. R. B., No. 68.

⁴Consolidated Edison Company of New York, Inc., et al., v. N. L. R. B., 305 U. S. 197; Matter of Nebel Knitting Company, Inc., 6 N. L. R. B. 284, affirmed 103 F. 2d 594 (C. C. A. 4); Matter of Bird Machine Company, 65 N. L. R. B. 311; and Matter of The Hills Brothers Company, 67 N. L. R. B. 1249. See also National Licorice Company v. N. L. R. B., 309 U. S. 350. In N. L. R. B. v. Hopwood Retinning Co., Inc., et al., 98 F. 2d 97 (C. C. A. 2), cited by the respondents, charges were filed against Hopwood. During the hearing, the complaint was amended so

In the instant case, the Respondents do not contend that they were surprised or had insufficient notice.⁵

3. The Trial Examiner found that Respondent Warner discriminatorily discharged 14 prop makers⁶ on March 19, 1945, in violation of the Act. We do not agree that they were discharged. Within a few hours after "Off Payroll Notices" were distributed to the entire morning shift of 38 prop makers,⁷ Francis E. Fuhrmann, head of Respondent

as to add Monarch as a party respondent. The court refused to enforce the Board's order against Monarch. The Hopwood case is distinguishable from the instant case and the cases cited above, for there Monarch had insufficient notice and was not accorded a reasonable opportunity to prepare its defense.

⁵With respect to complainants Seward, Coffey, and Howe, a verified charge was filed with the Board, but it was neither formally docketed nor served on the Respondents. However, counsel for the Respondents discussed these three cases with a representative of the Board. Moreover, the original consolidated complaint, which contained all four names, was served on the Respondents on July 19, 1946, almost 2 months before the hearing. We note, also, that the Respondents did, in fact, offer testimony at the hearing with respect to the discharges of Seward, Coffey, Howe, and Stanley.

⁶Complainants Batchelder, Bonning, De Sanctis, Gidlund, Hand, Jensen, Lamb, Lora, MacKellar, Rogers, Sapp, Simpson, Stoica, and White.

⁷Fuhrmann testified that "Off Payroll Notices," such as were issued to the prop makers on March 19, were customarily given to employees temporarily laid off as well as to discharged employees. The "Off Payroll Notices" do not contain any reference to "discharge" or to "termination."

Warner's technical department, called the "discharged" prop makers to the Warner studio. Addressing them as a group, Fuhrmann urged them to keep the studio operating. They agreed to do so under certain conditions, which Fuhrmann apparently accepted. Later, Fuhrmann telephoned some of the prop makers, stated that he could not keep the agreement, and asked the prop makers to come to work the next morning as carpenters. None complied. On March 22, the prop makers, by a vote of 19 to 16, determined ot return to work under the terms laid down by Fuhrmann.⁸ The following day the majority of the prop makers did, in fact, return to the studio.

Despite Respondent Warner's policy of taking discharged employees back as new employees with no seniority, Fuhrmann testified that those returning on March 23 were not rehired as new employees and had never been taken off the payroll. During the remainder of the strike, complainant Stoica, one of the "discharged" Warner prop makers, saw Fuhrmann several times and asked for his old job. Fuhrmann told him that unless he agreed to work in the carpenter shop, he could not work again for Respondent Warner. On this point, Fuhrmann testified as follows:

Q. And the only way any of them could have gone back to work after March 19th, 1945,

⁸We note that Gibbons, a representative of Respondent, attended the meeting at which this vote was taken, and urged the men to return to work as carpenters.

was by being willing to go into the carpenter shop. Is that correct?

A. By being willing to go into the carpenter shop, or if we had prop work to do, they would come in as prop makers.

In September, two other prop makers returned to the studio and performed carpenter work.⁹ After the termination of the strike, the prop makers who had not previously returned to work applied for reinstatement. One¹⁰ was reinstated almost immediately and several others were taken back at later dates.¹¹

In view of the above circumstances, we are convinced that the issuance of "Off Payroll Notices" to the prop makers on March 19 was only a tactical maneuver designed to encourage them to accede to Respondent Warner's demand that they perform carpentry work. The record is clear that any of them could have been reinstated during the strike, if only they agreed to the terms imposed upon them. In fact, the pressure thus brought to bear was successful in securing the capitulation of the majority. It is therefore evident that those who held out to the end had not been discharged, but voluntarily and collectively withheld their labor rather than indulge in conduct which violated their principles. In effect,

⁹G. Schnell and Harold R. Horner. These employees are not complainants herein.

¹⁰Complainant Paul De Sanctis.

¹¹See footnote 17, *infra*.

they were engaging in a concerted refusal to work, for their mutual aid and protection. Hence, they were strikers¹² and should be treated no differently, in view of the Cincinnati Agreement, than the other strikers mentioned in Section 5, *infra*.

4. The Trial Examiner found that three other complainants employed by Respondent Warner¹³ refused to cross the picket line established by the CSU on March 12, 1945, and remained away from the studio for the duration of the strike. He further found that seven other complainants, employees of various Respondents,¹⁴ voluntarily absented themselves from their jobs rather than perform the work of striking employees. We adopt these findings.¹⁵ Accordingly, we are of the opinion that these complainants, like the Warner prop makers, were strikers, engaged in concerted activities for their mutual aid and protection.

¹²We do not adopt the Trial Examiner's finding that the Warner prop makers were "partial strikers."

¹³Complainants John G. Goudie, Kenneth B. Coffey, and Willis F. Howe.

¹⁴Complainants Larson, Seward, and Stanley, employed by Respondent Warner; Cuccia and Hentschel, employees of Respondent Columbia; and Groth and Selgrath, employed by Respondent Loew's.

¹⁵We reject the contention of the complainants that these complainants were constructively discharged.

5. From October 15 to 24, 1945, while the CSU strike was in progress, the Executive Council of the AFL met in Cincinnati, Ohio, to resolve the dispute which had led to the CSU strike. It appears that the Respondents and the Alliance were represented at these meetings. On October 25, the Executive Council of the AFL issued a document referred to as the Cincinnati Agreement. Among other provisions, it ordered that the CSU strike be terminated and that "all employees return to work immediately." This directive was accepted by the unions involved, including the Alliance.

While all parties concerned apparently understood that all employees who had been "on call" on March 12, 1945, should return to the jobs they held on that date, a dispute soon arose as to whether or not employees who would be displaced by the returning strikers were to continue to work. To settle this conflict, representatives of the Respondents, the Alliance, and the CSU unions went to Washington, reviewed the minutes of the Cincinnati meetings, and conferred with the Executive Council of the AFL.

As a result, the Executive Council issued a "clarification" which stated, in effect, that the Cincinnati Agreement had directed that both strikers and replacements were to be employed for at least 60 days, within which period a jurisdictional award was to be made. Furthermore, the Executive Council directed that the Respondents should exercise their "usual prerogative" as to where they assigned their employees to work. In other words, strikers as well as replacements were to return to work pending a

jurisdictional award, and the Respondents in the meantime had discretion to assign the work among both groups in any manner the Respondents desired. Clearly, the Respondents and the Alliance accepted the Cincinnati Agreement and its "clarification." Under these agreed terms, the CSU strikers returned to work on October 31, 1945.

The 24 complainants discussed above had been "on call" on March 12, 1945, the day the strike commenced. They therefore came within the provisions of the Cincinnati Agreement and were entitled to be reinstated to their old jobs after October 31, 1945, on equal terms with the CSU strikers.¹⁶ All sought reinstatement. The Respondents, however, instead of rehiring these complainants, obliged them to obtain clearance from the Alliance solely because of their activities during the strike. This is unquestionably demonstrated by the instructions issued to the Respondent producers by Fred E. Pelton, the producers' labor administrator, on October 31, 1945. Those few who eventually secured the necessary clearance from the Alliance were subsequently reinstated,¹⁷ but the remainder have never been taken back.¹⁸

¹⁶We reject the contention of the Respondents that the Cincinnati Agreement had no application to recalcitrant Alliance members.

¹⁷Complainant De Sanctis conferred with officials of the Alliance on November 6, 1945, and as a result was reinstated by Respondent Warner on November 7, 1945, as a new employee. Complainant MacKellar was re-employed by Respondent Warner on August 5, 1946, "through the union." Complainant Rogers was called by the Alliance on February 11,

Having obligated themselves to take back all strikers, the Respondent could not lawfully discriminate against the complainants solely because of their activities during the strike.¹⁹ And this is true even though the Respondents, absent the Cincinnati Agreement, might perhaps have justified

1946, and was told to report to the studio the next day: accordingly, he was reinstated by Respondent Warner on February 12, 1946. Complainant Selgrath received word from the Alliance on December 18, 1945, advising him to return to work the next day. On December 19, 1945, the Alliance advised Respondent Loew's that Selgrath could return to work in a lower paid position. Selgrath was re-employed by Respondent Loew's on December 19, 1945, as a new employee in a lower paid position. Complainant Stanley was reinstated by Respondent Warner about November 14, 1945, through a call to the Alliance. He was given a total of 6 days' work spaced over a period of 3 or 4 weeks.

¹⁸So far as the record shows, the only complainant who was taken back without clearance from the Alliance was Irwin P. Hentschel. He was reinstated by Respondent Columbia on October 31, 1945, for 1 day only, then "laid off" at the end of his shift. We find that the "lay off" was, in fact, a discriminatory discharge because of Hentschel's activities during the strike, motivated by Pelton's instructions of the same day.

¹⁹L. M. Comes, Respondent Warner's chief electrician, admitted that he did not call back any employees who he knew had failed to cross the picket lines during the strike "unless they had good reason." Complainant Stoica testified that Carroll Sacks, Respondent Warner's labor relations manager, stated that he could not be reinstated because "it would be unfair to the men who had cooperated with the studio."

their discriminatory conduct on the grounds of the strike's arguably "illegal" character. However, whatever defense the Respondents might otherwise have had was waived by the Cincinnati Agreement. Thus the Respondents may not now be heard to say that the concerted activities in which the complainants engaged were not protected by the Act. As was said by the Court in the Hazel-Atlas case:²⁰

In this instance the employer was under no legal compulsion to take the strikers back since they had violated the governing agreement; but when their breach was overlooked, and it was decided to reinstate them, they were entitled to even-handed treatment, and the exclusion of any of them for reasons condemned by the statute would have been an unfair labor practice.

Pelton's instructions to the Respondent producers cannot be reconciled with the over-all settlement of the strike contained in the Cincinnati Agreement. As between the two, the terms of the Cincinnati Agreement must prevail, as it was binding on the Respondents and the Alliance. Nor could the Respondents escape responsibility for their discriminatory conduct by the device of requiring the complainants, as a condition precedent to obtaining their rights under the Cincinnati Agreement, to se-

²⁰Hazel-Atlas Glass Company v. N. L. R. B., 127 F. 2d 109 (C. C. A. 4), at 118.

cure clearance from the Alliance.²¹ We conclude that the complainants, like the CSU strikers, were entitled to be reinstated to their former positions on and after October 31, 1945, upon application. By discriminatorily refusing to reinstate complainants Batchelder, Bonning, Coffey, De Sanctis, Gidlund, Goudie, Hand, Howe, Jensen, Lamb, Larson, Lora, MacKellar, Rogers, Sapp, Seward, Simpson, Stanley, Stoica, and White on the respective dates on which they applied for reinstatement,²² because

²¹We find no merit in the Respondents' contention that referral to the Alliance was required by the closed-shop contracts. Neither the wording of the contracts nor the previous conduct of the parties indicates that the contracts were meant to have such an effect.

²²We find that these complainants applied for reinstatement of the following dates:

Batchelder, on October 31, 1945, as found by the Trial Examiner.

Bonning, on November 14, 1945, contrary to the Trial Examiner's finding.

Coffey, on October 31, 1945, as found by the Trial Examiner.

De Sanctis, on November 6, 1945, the day before he was reinstated as a new employee. Reinstatement as a new employee, we find, was discriminatory.

Gidlund, on October 31, 1945.

Goudie, on October 31, 1945.

Hand, on November 6, 1945, contrary to the Trial Examiner's finding.

Howe, on October 31, 1945, as found by the Trial Examiner.

Jensen, on November 6, 1945, as testified by De

of their collective activities during the strike, Respondent Warner has engaged in unfair labor practices. By discriminatorily discharging complainant Hentschel on October 31, 1945,²³ and refusing to reinstate complainant Cuccia on November 15, 1945,²⁴ Respondent Columbia has violated the Act. By discriminatorily refusing to reinstate complainant Selgrath on October 31, 1945,²⁵ and complainant Groth

Sanctis.

Lamb, on October 31, 1945, as found by the Trial Examiner.

Larson, on November 2, 1945, contrary to the Trial Examiner's finding.

Lora, on October 31, 1945, as found by the Trial Examiner.

MacKellar, on November 14, 1945.

Rogers, on October 31, 1945, as found by the Trial Examiner.

Sapp, on November 6, 1945.

Seward, on October 31, 1945, as found by the Trial Examiner.

Simpson, on November 1, 1945.

Stanley, on October 31, 1945, as found by the Trial Examiner. Although "reinstated" in November, 1945, he received a total of only 6 days' work spaced over a period of 3 or 4 weeks. This intermittent employment, we hold, was not a bona fide reinstatement to his former position, but a discriminatory refusal to reinstate.

Stoica, on October 31, 1945, contrary to the Trial Examiner's finding.

White, on November 6, 1945, as found by the Trial Examiner.

²³See footnote 18, *supra*.

²⁴Cuccia set the date as "sometime in November, 1945, right after the strike. It might be the first part of December." We adopt a mean date.

²⁵Respondent Loew's was advised by the Alliance

on November 3, 1945, Respondent Loew's has engaged in unfair labor practices. By issuing orders to the Respondent producers on October 31, 1945, which caused Respondents Warner, Columbia, and Loew's to commit these unfair labor practices, Respondent Association has violated the Act.

6. The Respondents and the Alliance argue that the CSU strike was not protected activity, that the complainants were not engaged in protected activity because they were "wildcat" strikers, and that the Warner prop makers were properly discharged for insubordination because they attempted to stay on their jobs and draw pay while refusing to obey the lawful orders of the Respondents.²⁶ If the complainants were not engaged in concerted activity protected by the Act, their conduct may have justified the Respondents in denying them reinstatement. But the Respondents waived this justification by

on October 31 or November 1, 1945, that Selgrath was not in good standing as a member. Selgrath, in fact, was a member in good standing at all pertinent times. Assuming, without deciding, that Respondent Loew's relied in good faith on this notice and, for this reason, refused to reinstate Selgrath, we believe that the refusal to rehire him was nevertheless discriminatory. See *Matter of General Electric X-Ray Corporation*, 76 N. L. R. B. 64. We are of the opinion that the Cincinnati Agreement superseded the closed-shop contract insofar as reinstatement of the strikers was concerned. We adopt the date of October 31, 1945, as the date of Selgrath's application for reinstatement, rather than the date of November 1, 1945, found by the Trial Examiner.

²⁶As previously found, the Warner prop makers were not "discharged." The "Off Payroll Notices" were merely a tactical maneuver.

joining in the Cincinnati Agreement.²⁷ Having agreed to reinstate all striking employees (including the CSU strikers) in the interest of industrial harmony, the Respondents could not later discriminate against the complainants because of their conduct before the settlement of the strike. The crux of the Respondents' unlawful discrimination is the disparity between their treatment of the complainants and their treatment of the CSU strikers, after having agreed to treat all alike.²⁸ Accordingly, we find it unnecessary to decide herein whether or not, during the strike, the complainants were engaged in protected concerted activity.²⁹

²⁷*Stewart Die Casting Corporation v. N. L. R. B.*, 114 F. 2d 849 (C. C. A. 7), cert. den. 312 U. S. 680; *N. L. R. B. v. Aladdin Industries, Inc.*, 125 F. 2d 377 (C. C. A. 7), cert. den. 316 U. S. 706; *Matter of The Carey Salt Company*, 70 N. L. R. B. 1099; *Matter of Victory Fluorspar Mining Company, et al.*, 72 N. L. R. B. 1356; and *Matter of The Fafnir Bearing Company*, 73 N. L. R. B. 1008.

²⁸The Respondents argue that they did not rehire the complainants because there were no vacant jobs for them. In view of the fact that the Respondents reinstated all the CSU strikers despite their prior replacement, we find no merit in this contention. Assuming, for the purposes of argument, that the complainants had been replaced during the strike, the same was undoubtedly true of the CSU strikers. The failure to reinstate the complainants, therefore, serves to emphasize the unequal treatment accorded them. Accordingly, we need not, and do not, make any findings with respect to the replacement of the complainants during the strike.

²⁹For this reason, we shall not disturb the Trial Examiner's refusal to take judicial notice of certain

7. The Trial Examiner concluded that the Respondents violated Section 8 (3) of the Act by discriminating in regard to the hire and tenure of employment of the complainants, thereby discouraging membership in the Alliance. The Respondents and the Alliance except to this conclusion, urging that the Respondents' conduct could not have discouraged membership in the Alliance. We are convinced and find that the discriminatory discharge and refusals to reinstate discussed above constituted interference, restraint, and coercion of the complainants in the exercise of the rights guaranteed them in Section 7 of the Act, in violation of Section 8 (1) of the Act. Viewing the discriminatory conduct as a violation only of Section 8 (1) of the Act, we find that effectuation of the policies of the Act requires the remedy set forth below.³⁰ Accordingly, we do not adopt the Trial Examiner's finding that the Re-

administrative and procedural matters arising in connection with the previous representation case (64 N. L. R. B. 490), offered for the purpose of showing the illegality of the CSU strike. We therefore need not rule on the motion of counsel for the Board and counsel for the Alliance that, if we overrule the Trial Examiner in this respect, the case be remanded for further hearing.

³⁰Matter of Texas Textile Mills, 58 N. L. R. B. 353; Matter of Ever Ready Label Corporation, 54 N. L. R. B. 551; Matter of Home Beneficial Life Insurance Co., 69 N. L. R. B. 32; and Matter of Spencer Auto Electric, Inc., 73 N. L. R. B. 1416. See also N. L. R. B. v. Hymie Schwartz, d/b/a Lion Brand Manufacturing Company, 146 F. 2d. 773 (C. C. A. 5), enf'g as mod. 55 N. L. R. B. 798.

spondents' conduct discouraged membership in the Alliance in violation of Section 8 (3) of the Act.

8. The Trial Examiner found that sufficient reason existed for Respondent Warner's refusal to reinstate complainant Stanley in his old job on and after November 29, 1945,³¹ because of Stanley's misconduct on that date. We adopt this finding, to which no party excepts.

9. On motion of counsel for the Board, the Trial Examiner dismissed the complaint against Respondent Warner, insofar as it alleged the discriminatory discharge of H. C. MacDonald. We agree.

10. The Trial Examiner found that Respondent Republic discriminatorily refused to reinstate complainant Robert W. Ames on or about October 31, 1945. We do not agree. We adopt the Trial Examiner's finding that Ames' layoff on March 29, 1945, was not motivated by Ames' refusal to perform carpentry work. As Ames was legitimately laid off, he remained a laid-off employee for the duration of the strike. As such, he was not covered by the terms of the Cincinnati Agreement. He was not a striker, and there is no evidence that he was refused reinstatement because of any concerted ac-

³¹Stanley was not discharged on November 29, 1945, but merely taken off the call list. After that date, Respondent Warner would not have called him directly, but would have accepted him if he had been sent by the Alliance in response to a general request for "more men."

tivity.³² Accordingly, we find that the refusal to rehire Ames on or about October 31, 1945, was not a violation of the Act, and we shall therefore dismiss the complaint against Respondent Republic.³³

11. The Trial Examiner found that Respondent Twentieth Century discriminatorily refused to reinstate complainant Eugene V. Mailes on October 31, 1945. We do not agree. Mailes worked at his regular job during the strike and up to October 1, 1945. During that time he was never asked to perform any work over which the jurisdiction of any of the striking CSU unions had been clearly established. On October 1, 1945, Mailes went on his regular paid vacation which was authorized to run from October 1 to 13, 1945, inclusive. However, he did not report for work again until after the strike was ended. As set forth in the Intermediate Report, he made certain attempts to secure an indefinite extension of his vacation, without pay. It appears that Mailes

³²Ames testified that, when he applied for reinstatement after the strike had terminated, he spoke to MacDonald, Respondent Republic's personnel manager. According to Ames, MacDonald said: "Well, your case is different, Ames. You weren't on strike, were you?" and Ames replied, "No, but since I was laid off I have respected picket lines." It is difficult for us to conceive how an employee, while laid off, can "respect" picket lines. Ames' testimony clearly stamps him as a laid-off employee, rather than a striker.

³³Case No. 21-C-2563. The alleged discriminatory refusal to reinstate Ames was the only violation of the Act of which the Trial Examiner found Respondent Republic to have been guilty.

did not obtain the necessary extension in the prescribed manner, and was therefore dropped from the payroll after 6 days of unauthorized absence, in accordance with Respondent Twentieth Century's custom.³⁴ There is some evidence that the refusal to reinstate Mailes was based, in part, on Respondent Twentieth Century's belief that he had voluntarily quit.³⁵ Mailes' actual reason for remaining away from his job from the end of his approved vacation until the termination of the strike is not clear.³⁶

In view of the fact that, prior to his vacation, Mailes had continuously crossed the picket line over

³⁴The Respondent introduced into evidence a "Daily Report of Changes in Personnel" bearing an "effective date" of October 13, 1945, and stamped October 22, 1945. It lists Mailes under "employees closed today." The Trial Examiner refused to accord any weight to this document on the ground that it was prepared on October 13, 1945, before Mailes was due to return. We do not agree. We find that the document was prepared on October 22, 1945, effective as of October 13, 1945, and have given it due consideration.

³⁵Mailes testified that Meyer, Respondent Twentieth Century's personnel manager, told him in November, 1945, "that the information he had had from the payroll department was that I had voluntarily quit my job."

³⁶Mailes testified that, on October 15, 1945, he told his superior he desired an extension because "there was a chance of some of us being instrumental in bringing it (the strike) to a quick and amicable conclusion." He further testified that, a few days later, he told another superior he wanted an extension "because of the increased violence on the picket line."

a period of more than 6 months and had not been asked to perform strikers' work, we cannot assume that Mailes became a striker. Moreover, we agree with the finding of the Trial Examiner that Mailes had requested an indefinite extension of his vacation without pay, and had reasonable ground to believe that his request had been granted. The essence of a strike is the voluntary concerted withholding of labor requested by an employer. It would therefore be illogical to consider as a striker an employee who had requested and who believed he had obtained permission to absent himself from work. A striker does not seek permission to strike. Consequently, we find that Mailes was not a striker and was not covered by the terms of the Cincinnati Agreement. Accordingly, we find that the refusal to reinstate Mailes on October 31, 1945, was not a violation of the Act. We shall therefore dismiss the complaint against Respondent Twentieth Century.³⁷

12. On motion of counsel for the Board, the Trial Examiner dismissed the complaint against Respondent RKO, insofar as it alleged the discriminatory refusal to reinstate complainant Forrest McLoney from October 31 to December 27, 1945. As the record discloses no evidence that Respondent RKO engaged in any other conduct violative of the

³⁷Case No. 21-C-2664. The alleged discriminatory refusal to reinstate Mailes was the only violation of the Act of which the Trial Examiner found Respondent Twentieth Century guilty.

Act, we shall dismiss the complaint against Respondent RKO in its entirety.³⁸

13. We agree with the Trial Examiner's conclusions that, under the circumstances of this case, the alleged "bonus" payments were not unlawful, and that the Respondents did not violate Section 8 (1) of the Act by making such payments.³⁹

14. In view of the fact that we have found Respondent Warner guilty of violating Section 8 (1) of the Act, we deem it unnecessary to determine whether or not Fuhrmann's alleged threat to the Warner prop makers constituted a further violation of Section 8 (1). We therefore do not adopt the Trial Examiner's finding in this respect.

15. We adopt the Trial Examiner's finding, to which no exception was taken, that the Respondents have not violated Section 8 (1) of the Act by interrogating employees with respect to their union membership and affiliation.

The Remedy

Having found that Respondents Warner, Columbia, Loew's and Association violated Section 8 (1) of the Act, we shall order that these Respondents cease and desist therefrom and take certain affirma-

³⁸Case No. 21-C-2665.

³⁹Matter of Association of Motion Picture Producers, Inc., et al., 79 N. L. R. B. 466. See also R. H. Macy & Co., Inc., v. New York State Labor Relations Board, et al., 79 N. Y. Sup. 2d 847 (N. Y. Sup. Ct., N. Y. County).

tive action which we find necessary to effectuate the policies of the Act.

a. Complainants Expelled from the Alliance.

At all material times, the respondent producers were parties to a collective bargaining contract with the Alliance which covers various units containing the complainants. This agreement contains closed-shop provisions. About 8 months after the discriminatory refusals to reinstate the complainants, certain of the complainants⁴⁰ were expelled or suspended from membership in the Alliance. The record is silent as to the reasons for these expulsions and suspensions.

The validity of the closed-shop contract is not in question. nor is it disputed that the complainants came within its coverage. The Respondents and the Alliance contend that the expelled and suspended complainants have rendered themselves ineligible for employment and that the Board is consequently without authority to order their reinstatement. The Trial Examiner, rejecting these arguments, recommended the reinstatement of the expelled and sus-

⁴⁰Under sentence dated May 31, 1946, and served on June 14, 1946, complainants Gidlund, Hentschel, Lamb, Lora, Sapp, and Stoica were expelled from the Alliance and complainants Batchelder and Hand were suspended for a period of 6 months starting June 17, 1946, and fined \$300 each, payable within 2 months on pain of automatic expulsion. Neither Batchelder nor Hand paid the fine. The Respondents were notified of these expulsions and suspensions on June 14, 1946.

pended complainants, and the Respondents and the Alliance have excepted to this ruling. We find merit in these exceptions. In considering this matter, we need not pass upon the extent of the Board's power to reinstate the complainants in question. We think that, under the circumstances of this case, it would be unwise to override the contractual rights and obligations of the parties to a valid closed-shop contract, and thus undermine the effective disciplinary power of the Alliance.⁴¹ Therefore, it would not effectuate the policies of the Act to order the reinstatement of those complainants who were expelled or suspended from the Alliance. We shall award back pay to each of them only up to the date of his expulsion or suspension, as the case may be.

Complainants Gidlund and Lamb were discriminatorily denied reinstatement by Respondent Warner on October 31, 1945, and complainant Sapp on November 6, 1945. They were expelled from the Alliance under sentence served on June 14, 1946. Consequently, we shall not order their reinstatement.

⁴¹The expulsions and suspensions discussed above occurred more than 8 months after the termination of the strike, and the grounds therefor are not disclosed. In view of the lapse of time and the fact that other recalcitrant Alliance members continued in good standing, we cannot assume that the expulsions and suspensions were related to the complainants' activities during the strike. The Cincinnati Agreement therefore had no application to this situation. Consequently, these cases differ materially from the case of complainant Selgrath, discussed in footnote 25, *supra*.

ment. We shall, however, order Respondent Warner to make them whole for any loss of pay they may have suffered by reason of the discrimination against them by payment to each of them of a sum of money equal to that which he normally would have earned as wages from the date he was refused reinstatement to June 14, 1946, the date he became ineligible for re-employment, less his net earnings during said period.⁴²

Complainant Lora was discriminatorily refused reinstatement on October 31, 1945. He was expelled from the Alliance by sentence served on July 14, 1946. Accordingly, we shall not order him reinstated. We adopt the Trial Examiner's finding that Lora made no particular effort to secure employ-

⁴²The Respondent maintains that Sapp made no reasonable effort to obtain employment after being refused reinstatement. This contention is apparently based on the fact that Sapp, because of illness, refused a job offered by Respondent Columbia. The record reveals that Sapp signed the Alliance call book on November 9, 1945, only 3 days after he had been refused reinstatement. On November 24, 1945, the Alliance sent him a telegram reading: "Please notify this local union if you are available to accept employment in positions which we may have to offer, or advise what you will accept."

He replied 2 days later as follows: "Willing and anxious to accept position held on March 12. Please advise."

Moreover, Sapp was employed for 6 months by the Yalta Restaurant Company and was supervising construction work for one Simon Lazarus, at the time of the hearing. Under all the circumstances, we are persuaded that Sapp made reasonable efforts to obtain employment.

ment after April 1, 1946. We therefore adopt that part of the Trial Examiner's recommendation which deals with Lora's reimbursement, except that his back pay shall commence on October 31, 1945.⁴³

Complainant Stoica was discriminatorily refused reinstatement on October 31, 1945. By sentence served on June 14, 1946, he was expelled from the Alliance. Consequently, we shall not direct his reinstatement. The Respondents maintain that Stoica did not make reasonable efforts to obtain employment, relying on the facts that he refused an offer of employment by Respondent Columbia on November 16, 1945, that he declined several jobs offered him by hardware manufacturing companies, and that he spent time collecting donations for the complainants. We are of the opinion that Stoica had reasonable grounds for refusing the jobs tendered

⁴³The complainants urge that "consideration should be given to whether he registered with the U.S.E.S. and whether he refused to accept offers of employment made through the U.S.E.S." Registration with the United States Employment Service is conclusive evidence that a reasonable search for employment has been made. Matter of The Ohio Public Service Company, Inc., 52 N. L. R. B. 725; and Matter of Montgomery Hardwood Flooring Company, Inc., 72 N. L. R. B. 113. Accordingly, Lora's back pay may be increased by adding thereto any periods between April 1 and July 14, 1946, during which he was registered with the United States Employment Service and did not unreasonably refuse tendered employment or unreasonably quit employment entered upon, less his net earnings during said periods.

him.⁴⁴ Moreover, it is undisputed that Stoica signed the Alliance call book on November 9, 1945,⁴⁵ that he registered with the United States Employment Service,⁴⁶ that he worked 3 weeks at Respondent Republic and 2 days on the Ice Follies, and that he has been working at the Universal studio since May, 1946. Stoica testified that from October 31, 1945, until "about February, 1946," he spent full time collecting donations for the complainants and others. Under these circumstances, we find that, after February 1, 1946, Stoica made reasonable efforts to secure employment. Accordingly, we shall order Respondent Warner to make him whole for any loss of pay he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned as wages from February 1,

⁴⁴Stoica testified without contradiction that he rejected the Columbia job because it was on the night shift, was for only 1 or 2 days, and was under one Bendowsky, whose name was on a list of witnesses against Stoica attached to charges filed against him before the Alliance. He also stated that he turned down the hardware positions because "the rate of pay was so low, I wouldnt have been able to support the family . . . just a fraction of what the studios used to pay me."

⁴⁵Alliance locals maintain call books upon which a member desiring employment may enter his name. Studios seeking employees are sent available men from among those listed in the call books.

⁴⁶See footnote 43, *supra*. The record does not disclose the date on which Stoica registered with the United States Employment Service.

1946,⁴⁷ to June 14, 1946, the date he disqualified himself for employment, less his net earnings during said period.

Complainant Hentschel was discriminatorily discharged by Respondent Columbia on October 31, 1945.⁴⁸ He was expelled from the Alliance by sentence served on July 14, 1946. Accordingly, we shall not order his reinstatement. We shall, however, order Respondent Columbia to reimburse him for loss of wages in the same manner in which we have heretofore ordered Respondent Warner to reimburse complainants Gidlund, Lamb, and Sapp.

Respondent Warner discriminatorily refused to reinstate complainant Batchelder on October 31, 1945, and complainant Hand on November 6, 1945. They were fined and suspended from the Alliance effective June 17, 1946, and subsequently automatically expelled for failure to pay the fines. Accordingly, we shall not order their reinstatement. We shall order Respondent Warner to make them whole for any loss of pay they may have suffered by reason of the discrimination against them by payment to each of them of a sum of money equal to that which he normally would have earned as

⁴⁷Stoica's back pay may be increased by adding thereto any periods between October 31, 1945, and February 1, 1946, during which he was registered with the United States Employment Service and did not unreasonably refuse tendered employment or unreasonably quit employment entered upon, less his net earnings during said periods.

⁴⁸See footnote 18, *supra*.

wages from the date he was refused reinstatement, to June 17, 1946, the date he became ineligible for re-employment, less his net earnings during said period.

b. Other Complainants

Complainant Bonning was discriminatorily refused reinstatement on November 14, 1945.⁴⁹ He obtained permanent work elsewhere in May or June, 1946, and has not desired reinstatement since that time. Accordingly, we shall not order him reinstated. We adopt the recommendations of the Trial Examiner with respect to his reimbursement, except that his back pay shall commence on November 14, 1945.

Complainant De Sanctis applied for reinstatement on November 6, 1945, and was reinstated on the following day as a new employee. We have found that his reinstatement as a new employee was discriminatory,⁵⁰ as it necessarily deprived him of his accumulated seniority.⁵¹ We are of the opinion that nothing short of an order of reinstatement would provide him with adequate protection and effectuate

⁴⁹See footnote 22, *supra*. In view of this finding, we reject Bonning's contention that his back pay should commence March 19, 1945.

⁵⁰See footnotes 17 and 22, *supra*.

⁵¹De Sanctis testified that he had worked for Respondent Warner "about 4 or 5 years." Fuhrmann testified that Respondent Warner's practice on layoffs, despite the seniority provisions of the Alliance contracts, was to prefer those who had the greatest seniority with the company.

the purposes of the Act. Accordingly, we shall order Respondent Warner to offer De Sanctis immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges. It does not appear affirmatively that De Sanctis suffered any monetary loss. However, we shall order Respondent Warner to make him whole for any loss of pay he may have suffered by reason of his discriminatory reinstatement as a new employee, in the event that any such loss has occurred.

Complainant Goudie was likewise discriminatorily refused reinstatement on October 31, 1945. He desires reinstatement. The Respondents maintain that he wilfully incurred losses in earnings by failing to make a reasonable effort to obtain employment after he was denied reinstatement. Goudie signed the Alliance call book on February 14, 1946. He received 5 days' employment at Respondent Republic, but did not sign the call book again after that. The record discloses no other efforts by Goudie to obtain work. We find that Goudie did not make the kind of effort to obtain other employment which, under present conditions, a discharged employee may reasonably be expected to make. His loss in earnings is therefore found to have been a wilfully incurred loss, for which Respondent Warner should not, and will not, be directed to reimburse him.⁵² We shall, however, adopt the Trial Examiner's

⁵²Matter of Carroll's Transfer Company, 56 N. L. R. B. 935.

recommendation with respect to Gouldie's reinstatement.

Complainant Jensen was, as we have found, discriminatorily refused reinstatement on November 6, 1945. The parties stipulated that Jensen is now employed by Respondent Twentieth Century and, since obtaining this employment in February, 1946, has no desire to be reinstated to his former position with Respondent Warner. Accordingly, we shall not order Jensen reinstated. We shall, however, adopt the Trial Examiner's recommendations with respect to his reimbursement, except that his back pay shall commence on November 6, 1945.

Complainant Larson, we have found, was discriminatorily denied reinstatement on November 2, 1945. He desires to be reinstated. The Respondents maintain that Larson failed to make a reasonable effort to obtain employment elsewhere. We find merit in this contention. Like complainant Goudie, Larson signed the Alliance call book on February 14, 1946. He did not receive any calls, but explained this by saying, "One trouble was I did not have no telephone at the time, or they probably would have called me." The record does not disclose that he made any further effort to obtain work. He testified as follows:

Q. Did you sign it again or keep your name in the call book? A. No.

Q. Did you have another job? A. No.

Q. Don't you want a job?

A. For Warner Bros., yes.

Q. Anybody else? A. Not necessarily, no.

Q. Well, you were not willing to work for anybody else except Warner Bros., were you?

A. Well, I left Warner Bros., and figured I was entitled to go back there.

* * *

Q. Did you make an effort to get another job?

A. No.

Under the circumstances, we do not believe that Larson made a reasonable effort to obtain employment elsewhere and we shall not order Respondent Warner to reimburse him for his wilfully incurred loss of earnings. We shall, however, adopt the Trial Examiner's recommendation with respect to Larson's reinstatement.

Complainant MacKellar was discriminatorily refused reinstatement on November 14, 1945. He was reinstated by Respondent Warner on August 5, 1946.⁵³ Accordingly, we shall not order his reinstatement. It appears that MacKellar spent the first 3 months after he was refused reinstatement working on his house and thus voluntarily made himself unavailable for employment during that period. Accordingly, we shall order Respondent Warner to make MacKellar whole for any loss of pay he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned as wages from February 1, 1946, to August 5, 1946,

⁵³We do not accept the date of August 1, 1946, adopted by the Trial Examiner as the date on which MacKellar was reinstated.

the date of his reinstatement, less his net earnings during said period.

Complainant Rogers was discriminatorily refused reinstatement on October 31, 1945. He was reinstated by Respondent Warner on February 12, 1946. Accordingly, we shall not order him reinstated. We shall, however, adopt the recommendation of the Trial Examiner with respect to Rogers' reimbursement, except that his back pay shall commence on October 31, 1945.

Complainant Seward was discriminatorily denied reinstatement on October 31, 1945. He desires reinstatement. As justifiably pointed out by the Respondents, Seward made no effort to find work prior to December, 1945. At that time, he left on a motor trip, was hospitalized, and was not available for reemployment for 2 or 2½ months. After regaining his health, he notified the Alliance that he desired employment, and also worked for 3 months laying cement blocks. We are of the opinion that Seward was not entitled to back pay for any period prior to his recuperation. We shall, therefore, adopt the Trial Examiner's recommendations with respect to the reinstatement and reimbursement of Seward, except that his back pay shall commence from the date of his recuperation from his illness.

Complainant Simpson was discriminatorily refused reinstatement on November 1, 1945. He desires reinstatement. Simpson was ill and unable to work from about June 1, 1945, to about January 1,

1946.⁵⁴ We shall adopt the recommendations of the Trial Examiner with respect to Simpson's reinstatement and reimbursement, except that his back pay shall commence on January 1, 1946, the date on which he was able to resume his employment.

Complainant White was discriminatorily denied reinstatement on November 6, 1945. He desires reinstatement. The Respondents maintain that White made no reasonable efforts to find work.⁵⁵ We do not agree. White worked for the Yalta Restaurant Company for an undisclosed period of time, and obtained "a couple of days' work, one place and

⁵⁴Simpson testified that he was ill and unable to work for a period of approximately 7 months. He testified that the "discharge" by Respondent Warner made him "very ill" and that "the results of this strike and being discharged, the fact that this is the first job that I was ever discharged from in my life and my association on the Warner Bros. lot touched me to a point where I had a complete collapse and a break-down." Simpson maintains that, since his illness was caused directly by his discriminatory "discharge," this period of time should not be deducted from his back-pay order. We do not agree. We note that the "discharge" occurred March 19, 1945, while Simpson's illness commenced several months later. Under all the circumstances, we are not convinced that Simpson's illness can be attributed to the actions of Respondent Warner.

⁵⁵This contention is apparently based on White's following testimony:

Q. Did you make any effort to get work?

A. I worked when I wanted to work.

Q. You were able to work whenever you wanted to work, weren't you? A. That's right.

another.” In addition, he spent part of time working on a small walnut ranch which he owns.⁵⁶ We find that White made reasonable efforts to obtain employment. Therefore, we shall adopt the recommendations of the Trial Examiner with respect to the reinstatement⁵⁷ and reimbursement of White, except that White’s back pay shall commence on November 6, 1945.

Complainant Cuccia, we have found, was discriminatorily denied reinstatement on November 15, 1945. He desires reinstatement. Following the refusal of his request for reinstatement, Cuccia was in business for himself until February, 1946. After that, he testified, he did not attempt to get other employment and, at the time of the hearing, he was “living on my twenty dollars a week right now.” The Respondents maintain that, after February, 1946, he made no reasonable effort to find work.⁵⁸

⁵⁶White does not live on the ranch. We consider the time he spent working on this ranch as a period of self-employment.

⁵⁷White is a supervisor. However, exclusion of supervisors from coverage of the amended Act does not affect the Board’s power to issue an appropriate order to remedy unfair labor practices involving supervisors which occurred prior to the effective date of the Labor Management Relations Act, 1947. *Matter of Republic Steel Corporation (Upson Division)*, 77 N.L.R.B. 1107.

⁵⁸The Respondents apparently base their contention that Cuccia did not make a reasonable effort to work upon his following testimony on cross-examination:

Q. Did you work during the period of the strike

We cannot agree. In view of the fact that Cuccia is a veteran of World War II, we assume that the "twenty dollars a week" mentioned by Cuccia referred to benefits received by him under the Servicemen's Readjustment Act of 1944.⁵⁹ Registration with a public employment agency is a condition precedent to the receipt of such benefits.⁶⁰ We there-

anywhere? A. No, I did not.

Q. Not any place? A. Not any place.

Q. Did you try to get work?

A. No. I went in the trucking business in which I unfortunately went broke.

* * *

Q. All right. After the strike, did you work anywhere? A. No, I did not.

Q. Did you try to work anywhere?

A. No, I did not.

Q. Are you working now?

A. I am living on my twenty dollars a week now.

* * *

Q. All right. Then did you work anywhere after the latter part of February, 1946?

A. No, I didn't then.

Q. Did you try to get work anywhere?

A. I have been trying to go back to Columbia, yes.

Q. Did you try to get work anywhere else?

A. No, I didn't.

⁵⁹ 38 U.S.C.A. §693, et seq.

⁶⁰The Servicemen's Readjustment Act of 1944 provides, in part, as follows:

"Such person shall be deemed eligible to receive an allowance for any week of unemployment if * * * the person is registered with and continues to report to a public employment office, in accordance with its regulations * * *" 38 U.S.C.A. §696.

fore conclude that Cuccia made a reasonable search for employment during such periods as he was registered with a public employment agency. We adopt that part of the Trial Examiner's recommendation which requires Respondent Columbia to reinstate Cuccia. In addition, we will order Respondent Columbia to make Cuccia whole for any loss of pay he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned as wages from November 15, 1945, to the date of the offer of reinstatement, less his net earnings during said period, and excluding such periods, if any, after February 1, 1946, during which he was not registered with a public employment agency and made no reasonable efforts to secure employment.

We adopt the recommendations of the Trial Examiner with respect to the reinstatement of complainants Coffey and Howe by Respondent Warner, and of complainant Selgrath by Respondent Lowe's. We likewise adopt his recommendations as to the reimbursement by Respondent Warner of complainants Coffey,⁶¹ Howe, and Stanley, and by Respondent Loew's of complainants Groth and Selgrath.

⁶¹The Respondents maintain that Coffey made no reasonable effort to obtain work. This claim is apparently based upon his failure to re-sign the Alliance call book after he was laid off by Respondent Republic and his following testimony on cross-examination:

Q. Were you employed steadily during the early

We shall order Respondent Association to cease and desist from committing the unfair labor practices which we have found it committed. We shall dismiss the complaint as to Respondents Republic, Twentieth Century, and RKO, as we have found that these Respondents did not violate the Act.

ORDER

Upon the entire record in the case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondents Warner Bros. Pictures, Inc., Burbank, California; Columbia Pictures Corporation, Los Angeles, California; and Loew's, Incorporated, Culver City, California, and their respective officers, agents, successors, and assigns, shall:

1. Cease and desist from interfering with, restraining, or coercing their employees in the exercise

part of 1946? A. It wasn't necessary.

Q. What wasn't necessary?

A. For me to be employed steadily.

Q. You didn't want to be employed?

A. Not according to the rules and regulations.

Q. What do you mean by that?

A. Well, do I have to beg for a job?

Coffey placed his name on the Alliance call book after the strike, received a call from respondent Republic, where he worked for 4 days, made several other efforts to obtain employment elsewhere, and worked a week at PRC, 11 weeks at Chaplin Studio, and an unspecified period at the Inyokern Naval Base. We consequently find that he made reasonable efforts to obtain employment.

of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all of such activities except to the extent that such right may be affected by agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as guaranteed in Section 7 of the Act, by discharging or refusing to reinstate any of their employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of their employment, because of their participation in concerted activities for their mutual aid or protection, or by any like or related conduct.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Respondent Warner Bros. Pictures, Inc., Burbank, California, and its officers, agents, successors, and assigns, shall:

(1) Offer Kenneth B. Coffey, Paul De Sanctis, John G. Goudie, Willis F. Howe, Charles J. Larson, Fred Seward, William J. Simpson, and William G. White immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges;

(2) Make whole Lynn George Batchelder, Robert N. Bonning, Kenneth B. Coffey, Paul De Sanctis, Carl H. Gidlund, George M. Hand, Willis F. Howe, Charles Jensen, Leo Leonard Lamb, Raymond M. Lora, Donald MacKellar, J. Harold Rogers, Jesse L. Sapp, Fred Seward, William J. Simpson, Paul L. Stanley, George Stoica, Jr., and William G. White for any loss of pay they may have suffered by reason of Respondent Warner's discrimination against them, in the manner set forth in "The Remedy," herein.

(b) Respondent Columbia Pictures Corporation, Los Angeles, California, and its officers, agents, successors and assigns, shall:

(1) Offer Joseph P. Cuccia immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority and other rights and privileges;

(2) Make whole Joseph P. Cuccia and Irwin P. Hentschel for any loss of pay they may have suffered by reason of Respondent Columbia's discrimination against them, in the manner set forth in "The Remedy," herein.

(c) Respondent Loew's, Incorporated, Culver City, California, and its officers, agents, successors, and assigns, shall:

(1) Offer John L. Selgrath immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority and other rights and privileges;

(2) Make whole George I. Groth and John L. Selgrath for any loss of pay they may have suffered by reason of Respondent Loew's discrimination against them, in the manner set forth in "The Remedy," herein.

(d) Post in conspicuous places throughout their respective studios copies of the notices attached hereto marked Appendices A, B, and C.⁶² Copies of said notices, to be furnished by the Regional Director for the Twenty-first Region, shall, after being signed by representatives of the respective Respondents, be posted by the respective Respondents immediately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days from the date of this Order, what steps each of them has taken to comply herewith.

⁶²Respondent Warner shall sign and post copies of Appendix A, Respondent Columbia shall sign and post copies of Appendix B, and Respondent Loew's shall sign and post copies of Appendix C. In the event that this Order is enforced by decree of a United States Court of Appeals, there shall be inserted in the respective notices, before the words, "A Decision and Order," the words, "Decree of the United States Court of Appeals enforcing."

B. Respondent Association of Motion Picture Producers, Inc., Los Angeles, California, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from advising, urging, or otherwise influencing its member producers, directly or indirectly, to interfere with, restrain or coerce their employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act, as guaranteed in Section 7 of the Act, by discharging or refusing to reinstate any of their employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of their employment, because of their participation in concerted activities for their mutual aid or protection, or by any like or related conduct.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

- (a) Immediately send copies of the notice attached hereto and marked Appendix,⁶³ after they

⁶³In the event that this Order is enforced by decree of a United States Court of Appeals, there

have been signed by a representative of Respondent Association, to all its members, including all the Respondent producers. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being signed by a representative of Respondent Association, be posted by Respondent Association immediately upon receipt thereof and maintained for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Association to insure that said notices are not altered, defaced, or covered by any other material;

(b) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

And it is further ordered that the complaint be, and it hereby is, dismissed, insofar as it alleges (1) that the Respondents violated Section 8 (1) of the

shall be inserted in the notice, before the words, "A Decision and Order," the words, "Decree of the United States Court of Appeals Enforcing."

Act by making "bonus" payments, by interrogating employees with respect to their union membership and affiliation, or by threatening employees that they would never work again in the motion picture industry if they refused to perform the work of striking employees; (2) that Warner Bros. Pictures, Inc., discriminated against H. C. MacDonald; and (3) that Republic Productions, Inc., Los Angeles, California; Twentieth Century-Fox Film Corporation, Los Angeles, California, and RKO Radio Pictures, Inc., Los Angeles, California, committed any unfair labor practices.

Signed at Washington, D. C., this 31st day of March, 1949.

PAUL M. HERZOG,
Chairman.

JOHN M. HOUSTON,
Member.

ABE MURDOCK,
Member.

J. COPELAND GRAY,
Member.

[Seal]

NATIONAL LABOR RELATIONS BOARD.

APPENDIX A

Notice to All Employees

Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act, as guaranteed by Section 7 thereof, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of their employment, because of their participation in concerted activities for their mutual aid or protection, or by any like or related conduct.

We will offer to the employees named below, immediate and full reinstatement to their former or substantially equivalent positions, without preju-

dice to any seniority or other rights and privileges previously enjoyed.

Kenneth B. Coffey	Charles J. Larson
Paul De Sanctis	Fred Seward
John G. Goudie	William J. Simpson
Willis F. Howe	William G. White

We will make the following employees whole for any loss of pay suffered as a result of the discrimination against them, in accordance with the Order of the National Labor Relations Board.

Lynn George Batchelder	Raymond M. Lora
Robert N. Bonning	Donald MacKellar
Paul De Sanctis	Jesse L. Sapp
Kenneth B. Coffey	J. Harold Rogers
Carl H. Gidlund	Fred Seward
George M. Hand	William J. Simpson
Willis F. Howe	Paul L. Stanley
Charles Jensen	George Stoica, Jr.
Leo Leonard Lamb	William G. White

WARNER BROS. PICTURES, INC.
(Employer)

Dated.....

By.....

(Representative) (Title)

This notice must remain posted for 60 days from the date thereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

Notice to All Employees

Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act, as guaranteed by Section 7 thereof, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of their employment, because of their participation in concerted activities for their mutual aid or protection, or by any like or related conduct.

We will offer to the employee named below, immediate and full reinstatement to his former or a substantially equivalent position, without prejudice

to any seniority or other rights and privileges previously enjoyed.

Joseph P. Cuccia

We will make the following employees whole for any loss of pay suffered as a result of the discrimination against them, in accordance with the Order of the National Labor Relations Board.

Joseph P. Cuccia

Irwin P. Hentschel

COLUMBIA PICTURES CORPORATION,
(Employer)

Dated.....

By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX C

Notice to All Employees

Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act, as guaranteed by Section 7 thereof, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of their employment, because of their participation in concerted activities for their mutual aid or protection, or by any like or related conduct.

We will offer to the employee named below, immediate and full reinstatement to his former or a substantially equivalent position, without prejudice

to any seniority or other rights and privileges previously enjoyed.

John L. Selgrath

We will make the following employees whole for any loss of pay suffered as a result of the discrimination against them, in accordance with the Order of the National Labor Relations Board.

George I. Groth

John L. Selgrath

LOEW'S INCORPORATED,
(Employer)

Dated.....

By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date thereof, and must not be altered, defaced, or covered by any other material.

APPENDIX D

Notice to Our Members and Their Employees Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our members and their employees that:

We will not advise, urge, or otherwise influence our member producers, directly or indirectly, to in-

terfere with, restrain, or coerce their employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act, as guaranteed by Section 7 thereof, by discharging or refusing to reinstate any of their employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of their employment, because of their participation in concerted activities for their mutual aid or protection, or by any like or related conduct.

ASSOCIATION OF MOTION
PICTURE PRODUCERS, INC.

(Employer)

Dated.....

By.....

(Representative) (Title)

This notice must remain posted for 60 days from the date thereof, and must not be altered, defaced, or covered by any other material.

United States of America Before the National Labor
Relations Board Trial Examining Division,
Washington, D. C.

Case No. 21-C-2505

In the Matter of

COLUMBIA PICTURES CORPORATION and
ASSOCIATION OF MOTION PICTURE
PRODUCERS, INC.,

and

JOSEPH CUCCIA

Case No. 21-C-2562

In the Matter of

COLUMBIA PICTURES CORPORATION and
ASSOCIATION OF MOTION PICTURE
PRODUCERS, INC.,

and

IRWIN P. HENTSCHEL

Case No. 21-C-2563

In the Matter of

REPUBLIC PRODUCTIONS, INC., and ASSO-
CIATION OF MOTION PICTURE PRO-
DUCERS, INC.,

and

ROBERT AMES

Case No. 21-C-2564

In the Matter of

WARNER BROS. PICTURES, INC. and ASSO-
CIATION OF MOTION PICTURE PRO-
DUCERS, INC.,

and

L. G. BATCHELDER, PAUL DeSANCTIS,
CARL H. GIDLUND, G. M. HAND, CHAS.
JENSEN, LEO LAMB, R. M. LORA, H. C.
MacDONALD, DON MacKELLAR, W. J.
SIMPSON, GEORGE STOICA, ROBERT
BONNING, W. G. WHITE, JESSE L.
SAPP, J. C. GOUDIE, CHAS. J. LARSON,
FRED SEWARD, B. KENNETH COFFEY
and WILLIS HOWE.

Case No. 21-C-2660

In the Matter of

WARNER BROS. PICTURES, INC., and ASSO-
CIATION OF MOTION PICTURE PRO-
DUCERS, INC.,

and

J. HAROLD ROGERS

Case No. 21-C-2662

In the Matter of

LOEW'S INCORPORATED and ASSOCIATION
OF MOTION PICTURE PRODUCERS,
INC.,

and

GEORGE I. GROTH and ROBERT L. SEL-
GRATH

Case No. 21-C-2664

In the Matter of

TWENTIETH CENTURY-FOX FILM COR-
PORATION and ASSOCIATION OF MO-
TION PICTURE PRODUCERS, INC.,

and

EUGENE V. MAILES

Case No. 21-C-2665

In the Matter of

RKO RADIO PICTURES, INC., and ASSOCIA-
TION OF MOTION PICTURE PRODUC-
ERS, INC.,

and

FORREST McLONEY

MR. ROBERT RISSMAN,

For the Board.

O'MELVENY & MYERS, by

MR. HOMER I. MITCHELL and

MR. W. W. ALSUP,

Of Los Angeles, Calif.,

For the respondents Columbia Pictures
Corporation, Republic Productions, Inc.,

Warner Bros. Pictures, Inc., Loew's Incorporated, Twentieth Century-Fox Film Corporation, RKO Radio Pictures, Inc., and Association of Motion Picture Producers, Inc.

KATZ GALLAGHER and MARGOLIS, by
BEN MARGOLIS, of Los Angeles, Calif.,

For individual complainants Robert W. Ames, G. M. Hand, Irwin P. Hentschel, Charles Jensen, Leo J. Lamb, R. M. Lora, Eugene V. H. Mailes, Jesse L. Sapp, John L. Selgrath, George Stoica, Jr., and W. G. White.

BODKIN, BRESLIN & LUDDY, by
MICHAEL G. LUDDY
Of Los Angeles, Calif.,

For the Intervenor Alliance.

INTERMEDIATE REPORT

Statement of the Case

Upon various charges duly filed between April 6, 1945, and July 19, 1946, by certain named individuals, the National Labor Relations Board, herein called the Board, by its Regional Director for the Twenty-first Region (Los Angeles, California), issued its consolidated complaint dated July 19, 1946, against Columbia Pictures Corporation, herein called respondent Columbia; Republic Productions, Inc., herein called respondent Republic;

Warner Bros. Pictures, Inc., herein called respondent Warner; Loew's Incorporated, herein called respondent Loew; Twentieth Century-Fox Film Corporation, herein called respondent Twentieth Century; RKO Radio Pictures, Inc., herein called respondent RKO; Paramount Pictures, Inc., herein called Paramount; Universal Pictures Company, Inc., herein called Universal; Samuel Goldwyn Productions, Inc., herein called Goldwyn; Hal Roach Studios, Inc., herein called Roach; and Association of Motion Picture Producers, Inc., herein called respondent Association; alleging that the foregoing had engaged in unfair labor practices within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act.

By motion dated August 16, 1946, respondents Association, Columbia, Republic, Warner, Loew, Twentieth Century, and RKO, and Paramount, Universal, Goldwyn, and Roach moved to sever Matter of The Association of Motion Picture Producers, Inc., one of the consolidated cases,¹ from the other consolidated cases named in the caption above. The Board by order dated August 30, 1946, granted the

¹The full title is: In the Matter of Association of Motion Picture Producers, Inc.; Paramount Pictures, Inc.; Warner Bros. Pictures, Inc.; Loew's Incorporated; Universal Pictures Company, Inc.; R.K.O. Radio Pictures, Inc.; Columbia Pictures Corporation; Samuel Goldwyn Productions, Inc.; Republic Productions, Inc.; Hal E. Roach Studio, Inc.; and Twentieth Century-Fox Film Corporation and International Association of Machinists, Lodge 1185, Case No. 21-C-2735. This case involves alleged violations of Sections 8 (1), (3) and (5) of the Act.

said motion and directed that the Machinists case proceed to hearing prior to the hearing in the above consolidated cases. On September 3, 1946, the Board through its Regional Director issued an amended consolidated complaint covering the other consolidated cases, copies of which were duly served upon the respondents.

The amended consolidated complaint alleged in substance that: (1) the respondent Association is an employer within the meaning of the Act; (2) respondents Columbia, Republic, Warner and Loew on certain dates between March 12, 1945 and October 31, 1945, discharged and/or refused to reinstate certain named employees because the said employees refused to perform the work and take the jobs of other striking employees or pass a picket line, during the course of a strike in the motion picture industry, current between March 12 and October 31, 1945; respondents Twentieth Century and RKO refused on the termination of the strike, to reinstate certain named employees because the said employees refused to pass the picket line during the course of the said strike; (3) the respondent Association, on or about October 31, 1945, advised and instructed the respondent Producers² not to reinstate or hire employees who refused to cross picket lines during the strike and further advised the said respondents to lay off any such persons if they had been reinstated or employed; (4) respondents paid bonuses to employees who passed the picket lines or performed

²Respondent Producers when used hereafter refers collectively to respondents Columbia, Republic, Warner, Loew, Twentieth Century and RKO.

the work of striking employees during the strike referred to; threatened employees that they would never work in the motion picture industry again if they refused to perform the work or take the jobs of striking employees; and interrogated employees with respect to their union membership and affiliation. and (5) by reason of all the foregoing the respondents and each of them engaged in violations of Section 8(1) and (3) of the Act and by these acts and conduct interfered with, restrained, and coerced their employees in the exercise of rights guaranteed in Section 7 of the Act.

The respondents filed an answer on September 16, 1946, which admitted certain factual matters concerning the jurisdictional allegations of the complaint. It denied that respondent Association was an employer within the meaning of the Act. The answer set forth that: the strike of March 12, 1945, was called by Screen Set Designers, Illustrators & Decorators, Local 1421, of the International Brotherhood of Painters, Decorators, and Paperhangers of America, affiliated with the American Federation of Labor, herein called Local 1421; prior to the calling of the said strike, both Local 1421 and Local 44 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, affiliated with the American Federation of Labor,³ herein called Local 44, had presented con-

³Hereafter the International Union will be referred to as the Alliance.

flicting claims as to the appropriate unit in which set decorators should be included for the purposes of collective bargaining; because of the conflicting claims the respondent Producers on February 27, 1945, filed an employer's representation petition and in the course of a hearing thereon on March 12, 1945, Local 1421 called a strike against respondent Producers for the purpose of forcing them to recognize Local 1421 as collective bargaining representative of the set decorators. The answer denied the discriminatory discharge or refusal to reinstate any of the individual complainants. It averred that by virtue of closed shop contracts between respondent Producers and the Alliance and its locals, the Producers could not reinstate employees expelled from membership therein. Other defenses will be discussed hereafter in considering the cases of the individual complainants.

Pursuant to notice, a hearing was held at Los Angeles, California, on September 16, 1946, and from September 24 to October 10, 1946, before Mortimer Riemer, the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. On the second day of the hearing, the Alliance moved to intervene in the proceedings.⁴ The motion to intervene

⁴In its brief the Alliance states that it "intervened in these proceedings because it has a vital interest in avoiding any decision which would directly or indirectly review the disciplinary proceedings taken by it against such of its former members as are parties to these proceedings and in preventing a decision which would frustrate directly or indirectly such proceedings and the orders of the in-

was granted. At the conclusion of the Board's case, an appearance was noted on behalf of certain individual complainants named in this proceeding. The Board, the respondents, the Alliance and certain individuals were represented by counsel and all participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues was afforded all the parties.

At the outset of the hearing, counsel for the respondents moved to strike that portion of the amended consolidated complaint wherein it was alleged that respondent Association advised and instructed the other respondents not to reinstate or hire employees who refused to cross the picket lines during the strike and to lay off any such persons if reinstated, on the ground that no charge had been filed upon which the said allegation was based. It was also moved for the same reason, to strike that portion of the amended consolidated complaint which alleged that respondents paid a bonus to employees who passed the picket lines or performed the work of striking employees; threatened employees that they would never work in the motion picture industry again if they refused to perform the work of strikers and interrogated employees with respect to their union affiliation, or in the alter-

ternational President which were disobeyed not only by such expelled persons but by other members, parties to these proceedings, against whom disciplinary action was not taken."

native, that this portion of the complaint be made more definite and certain or a bill of particulars be ordered. The motions to strike for the above-stated reason were denied. The motion in the alternative for a bill of particulars was granted in part and counsel for the Board was directed to furnish the particulars as ordered.

Counsel for the Board moved to strike those portions of the respondents, answer setting forth facts pertaining to the cause of the strike of March 12, 1945. This motion was denied. On the third day of the hearing counsel for the Board furnished an oral bill of particulars to the respondents in conformity to the undersigned's ruling. With respect to that portion of the amended consolidated complaint which alleged that the respondents had interrogated employees with respect to their union membership and affiliation, it was stated that there had been no interrogation and that counsel would move to dismiss if not proven. No further proof was adduced in support of this allegation and it will be recommended hereinafter that this allegation be dismissed.

The respondents filed an amendment to the answer, to the effect that on or about June 14, 1946, respondent Warner was notified of the expulsion in some instances, and suspension in other instances, from the Alliance, of certain named individual complainants at one time employed by it and that pursuant to contracts in effect between the Alliance and Local 44, and respondent Warner, only em-

ployees who were members in good standing of both the Alliance and Local 44 could be employed in job classifications covered by the contracts. At the close of its case, counsel for the Board moved to dismiss the allegations of the complaint that the respondent Warner on March 19, 1945, discharged H. C. MacDonald, and that respondent RKO had refused and failed to reinstate Forrest McLoney. Both motions were granted.

During the presentation of the respondents' defense, counsel for the respondents called to the attention of the parties, the fact that the third amended charge on which the complaint was issued in Case No. 21-C-2564,⁵ did not contain the names of Kenneth B. Coffey, Willis F. Howe and Paul L. Stanley.⁶ Later during the course of the hearing counsel for the respondents asked to be relieved from the stipulation previously entered into with the Board to the effect that a charge had been filed containing the names of Coffey, Howe, and another individual, Fred Seward. The stipulation did not cover Stanley. Thereupon the counsel for the respondents moved that the complaint be dismissed with respect to Coffey, Howe, Seward and Stanley on the ground that the portions of the complaint alleging discrimination with respect to the named in-

⁵Matter of Warner Bros. Pictures, Inc., and Association of Motion Picture Producers, Inc., et al.

⁶The undersigned has adopted for use herein the spelling of names as given at the hearing and pursuant to the motion to conform, such spelling is used hereafter.

dividuals was not based on any charge filed by or on behalf of the said persons. Ruling on the motion was reserved pending an investigation of Board files and a report at the hearing by counsel for the Board. Without waiving its defense, respondents proceeded to a conclusion of its defense of discrimination with respect to these individuals.

On the final day of the hearing counsel for the Board disclosed that there was no official entry in the Board's Regional Office of a charge containing the names of Coffey, Howe and Seward. He stated that a charge had been presented to the Regional office by Ben Margolis, on behalf of the named individuals, on or about January 4, 1946, but that no explanation could be offered to explain why a filing date had not been placed up on the charge received by the Regional Office. As to the complainant, Stanley, counsel for the Board admitted that Stanley was not named in any charge and no explanation could be given for the failure to include Stanley's name. Whereupon counsel for the respondents renewed the motion to dismiss with respect to Stanley on the ground that no charge had either been filed or presented to the Regional Office and moved similarly with respect to Coffey, Howe and Seward on the ground that no charge had been filed and served upon the respondents. He admitted, however, that he had discussed with a Board Field Examiner the alleged discrimination against Coffey, Howe, and Seward but did not know at that time whether

charges had been filed. The motions to dismiss were denied.⁷

At the conclusion of the hearing, the Board moved to conform the pleadings to the proof with respect to such matters as dates, spelling of names, and similar items. Over the objections of counsel for the respondents, the motion was granted. All counsel were offered an opportunity to present oral argument but indicated a preference and a desire to file briefs. A time was fixed for the filing of briefs and after extensions of time were granted, briefs were submitted by counsel for the Board, the respondents and the Alliance.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

1. The Business of the Respondents.

Columbia Pictures Corporation, herein called respondent Columbia, a New York corporation having its principal office and place of business in New York City, is engaged in the manufacture of motion pictures. It distributes motion pictures which it produces, though some of its pictures are distributed by foreign distributing companies and licencees. It holds the stock of various foreign distributing com-

⁷Counsel for the individual complainants moved to amend the third amended charge by inserting in the said charge the names of the above individuals. This motion was denied.

panies and of the following subsidiary corporations: Screen Gems, Inc., a California corporation and Columbia Pictures Corp. of Louisiana, Inc., a Louisiana corporation. During 1943, respondent Columbia purchased approximately 106,000,000 feet of film from vendors located in the City of Los Angeles, and expended approximately \$13,600,000 in the production of motion pictures. For the 1942-1943 season, respondent Columbia produced 37 feature length motion pictures and made approximately 6,300 prints of these pictures, of which approximately 5,810 were shipped to points outside the State of California. Respondent Columbia also produced, for use during the same season, 28 short subjects, and made approximately 2,900 prints of these pictures, of which approximately 2,744 were shipped to points outside the State of California. The prints and pictures hereinabove described were distributed by respondent Columbia through its office in New York City.

Republic Productions, Inc., herein called respondent Republic, a New York corporation with its principal office located in New York City, operates studios for the production of motion pictures in the City of Los Angeles, California. It manufactures currently in excess of 30 feature length motion pictures per year. The pictures are distributed throughout the United States and foreign countries.

Warner Bros. Pictures, Inc., herein called respondent Warner, is a Delaware corporation whose principal office and place of business is located in

New York City. Its principal studio is located at Burbank, California, where it employs more than 3,000 employees, not including those employed on a daily basis. It distributes motion pictures through Vitagraph, Inc., a subsidiary corporation, which maintains exchanges in 31 cities throughout the United States. Respondent Warner usually produces more than 30 feature length pictures each year at its Burbank studio. During the fiscal year ending August 27, 1943, it expended more than \$19,000,000 on the production of motion pictures. Some of the prints of its pictures are printed in California, but others are printed in New York from master negatives shipped from California for the purpose of printing and distribution. Pictures are distributed throughout the United States and foreign countries.

Loew's Incorporated, herein called respondent Loew, a Delaware corporation, engaged in the business of producing and distributing motion pictures, and whose principal office is located in New York City, operates studios located at Culver City, California. During the course of each calendar year, the respondent Loew produces more than 30 feature length motion pictures, and a number of cartoons and short subjects. It causes the prints of these pictures to be distributed throughout the United States and various foreign countries. The respondent Loew employs many thousands of employees, both in the State of California and in the State of New York.

Twentieth Century-Fox Film Corporation, herein called respondent Twentieth Century, is a New York corporation engaged in the production and distribution of motion pictures, having its principal place of business in New York City and also maintaining a place of business in the City of Los Angeles, California. Various subsidiary corporations distribute its motion pictures in foreign countries. During the fiscal year of 1943, respondent Twentieth Century purchased several million feet of positive and negative film, the greater proportion of which was purchased within the State of California from suppliers who obtained the film from sources outside the State of California. During the same period, it expended more than \$20,000,000 in the production of motion pictures, produced approximately 40 feature length pictures and caused more than 10,000 prints to be made of all its pictures. It employs approximately 3,500 production employees in its studios at Los Angeles.

RKO Radio Pictures, Inc., herein called respondent RKO, a Delaware corporation having its principal office in New York City, operates a studio for the production of motion pictures in the City of Los Angeles, California. It manufactures currently in excess of 30 feature length motion pictures per year. The pictures so manufactured are distributed throughout the United States and foreign countries.

The Association of Motion Picture Producers, Inc., herein referred to as respondent Association, is now and has been at all times since January 18,

1924, a corporation organized under and existing by virtue of the laws of the State of California, having its principal office and place of business in the City of Los Angeles, California. The Association is a non-profit corporation organized for the following purposes: "To assist in fostering the common interests of those engaged in the motion picture industry in the United States, and especially in the State of California, by establishing and maintaining the highest possible moral and artistic standards in motion picture production, by developing the educational as well as the entertainment value and general usefulness of the motion picture, by diffusing accurate and reliable information with reference to the industry, by reforming abuses relative to the industry, by securing freedom from unjust or unlawful exactions, and by other lawful and proper means."

In promoting and furthering the aforesaid purposes and in the interest of its members, including each of the respondents named in this amended consolidated complaint, the Association permits certain of its employees to perform services for members of the Association as individual entities and the said employees on behalf of the members of the Association engaged in and now engage in the following activities: (a) the ascertainment of facts pertaining to wages, hours, and working conditions in the motion picture industry; (b) the analysis and dissemination of information so obtained; (c) the representation of members of the said Association

as individual entities and each of the respondents named herein, in their respective labor relations with their employees and in collective bargaining negotiations and adjustment of labor disputes; (d) the representation of members of the Association before the Board, its agents and various other governmental advisory or arbitration commissions or bodies; and (e) in general to advise, instruct and confer with members of the Association on matters pertaining to their employer-employee relations.⁸

II.

The Organizations Involved

International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 44, Local 80, Local 727 and Local 728, affiliated with the American Federation of Labor, are labor organizations admitting to membership employees of the respondent Producers.

III.

The Unfair Labor Practices

A. Is the Association an employer within the meaning of the Act.

The answer avers that while the Association permits certain of its employees to perform labor serv-

⁸The above findings concerning the business of the respondent Producers and the Association are based upon the allegations of the complaint and admissions contained in the answer.

ices for members of the Association, as for example, the representation of members in collective bargaining negotiations and adjustment of labor disputes, these activities are undertaken pursuant to the direction of the Respondent Producer and not pursuant to the direction of the Association. A more detailed analysis of the record therefore, is in order, to determine whether this distinction is such as to exclude the Association as an employer within the meaning of the Act.⁹

In 1928, Pat Casey was chosen chairman of the Producers Committee, a committee of the New York presidents of the major Producers.¹⁰ The major Producers are members of the Association. The Producers Committee delegated to Casey authority to act on its behalf in negotiating contracts with the Unions operating in Hollywood. As the complexities of the West Coast situation developed,

⁹Section 2 of the Act defines an employer as follows: "The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

¹⁰The so-called major Producers include respondents Columbia, Republic, Warner, Loew, Twentieth Century, RKO and Paramount Pictures, Inc., Universal Pictures Company Inc., Samuel Goldwyn Productions, Inc., and Hal Roach Studios, Inc.

Casey sought without success to keep negotiations in New York with the International heads of the Unions, separate from the problems which arose on a local basis in Hollywood. Sometime in 1939, Fred E. Pelton was engaged by the Producers Labor Committee, herein called the Labor Committee, to handle the Hollywood end of the negotiations. The Labor Committee is a committee appointed by the major Producers who are members of the Association and the committee acts for all members of the Association in their labor matters.

When Pelton was hired by the Labor Committee, it consisted of the representatives of Paramount Pictures, Inc., and respondents Loew and Columbia. Pelton is known as the Producers Labor Administrator and works as a team with Casey in the preparation and negotiation of contracts, on behalf of the Labor Committee for the 10 major Producers. Pelton is directly responsible to the chairman of the Labor Committee for the execution of whatever contracts the Labor Committee negotiates. His salary is paid by the Association, to which the Producers represented by the Labor Committee, belong. He testified that the Association and its officers had no authority over him and that he drew all his authority from the Labor Committee. During the strike, Pelton conferred with member representatives concerning the strike, issuing bulletins, and decisions of the Labor Committee. He received instructions at this time from the Chairman of the Labor Committee, B. B. Kahane, vice president of

respondent Columbia. One of Kahane's instructions, issued over Pelton's signature on October 31, 1945, was sent to all of the respondent Producers and directed them to refuse to reinstate members of the Alliance who refused to work during the strike.

In further support of the Board's contention that the Association was an employer, acting for and on behalf of its members, the respondent Producers, the Board offered in evidence, copies of notices appearing in *Daily Variety*, a trade paper, during the week following the onset of the strike. In these statements published over the name of the Association, and addressed to the employees of the motion picture industry, the Association spoke on behalf of its members and set forth certain facts concerning the 'jurisdictional quarrel' which had precipitated the strike. One advertisement stated that "our studios are crippled" and published facts which it asked the employees to consider. The Association pledged that its member Producers would abide by decisions of the Board, and recognize and bargain with any union certified by the Board.

Upon the basis of the facts admitted in the respondents' answer considered together with the testimony of Casey and Pelton, the undersigned is not convinced that a valid distinction has been drawn between the acts of Pelton as a labor administrator acting for and on behalf of the Labor Committee and the interests of the Association in the work of that committee. The Labor Committee is designated

by the Producers who are members of the Association. Pelton's salary is paid by the Association. His office is in the Association's building. Unions submit their proposals to Producers by sending them to Pelton as labor administrator at his office in the Association building. The undersigned is not persuaded by the distinction sought to be drawn by the respondents, that because Pelton works under direction of and handles employer-employee relations for the Labor Committee, that thereby the Association, whose members designated the Labor Committee, can be said to have divorced itself from its activities and hence cannot be found to be an employer within the meaning of the Act. The distinction is too subtle and lacks substance. The Labor Committee is appointed by members of the Association and acts for all Association members on labor matters. Realistically, it must be conceded, in the undersigned's opinion, that when the Labor Committee acts on behalf of the Producers who are Association members, the committee is taking a stand and advancing a position which is that of the Association and there can be no valid distinction between the Association as such and the activities of its members. In this connection, Jack Baker, respondent Republic's production manager, testified that its business manager "handles labor negotiations and . . . represents us at meetings with the Association and interprets all union contracts." The undersigned is of the opinion that the Association is an employer within the meaning of the Act. It is so found.

B. The contracts and start of the strike of March 12, 1945.

On April 17, 1944, at New York City, a basic agreement retroactive to January 1, 1944, was executed by and between the Alliance and respondents Columbia, Loew, Republic, RKO, Twentieth Century, and Warner. The Alliance executed the agreement on behalf of employee members of its West Coast locals employed at the studios of the respondent Producers.¹¹ The basic agreement provides in part as follows:

Whereas, The International Alliance represents that the majority of the employees of the Producers and each of them, in the crafts and classifications of work described in Paragraphs III and IV hereof (all of said crafts and classifications of work constituting an indivisible and integral bargaining

¹¹The West Coast locals of the Alliance are named in the basic agreement as follows: Affiliated Property Craftsmen, Local No. 44; Motion Picture Studio Grips, Local No. 80; Motion Picture Studio Projectionists, Local No. 165; International Photographers of the Motion Picture Industries, Local No. 659; Film Technicians of the Motion Picture Industry, Local No. 683; International Sound Technicians of the Motion Picture, Broadcast and Amusement Industry, Local No. 695; Motion Picture Costumers, Local No. 705; Make-Up Artists and Hair Stylists, Local No. 706; Motion Picture Studio Laborers and Utility Workers, Local No. 727; Studio Electrical Technicians, Local No. 728; and Motion Picture Studio First Aid Employees, Local No. 767. Local Nos. 44, 80, 727, and 728 are concerned in this proceeding.

unit), are members of the International Alliance and of one or more of its said West Coast Studio Locals:

Now, therefore, in consideration of the mutual covenants, conditions and agreements herein contained, the parties covenant and agree as follows:

I. Term of Agreement

The term of this agreement shall be from January 1, 1944 until August 10, 1949, provided, however, that either party may, by written notice given on or before July 15, 1945 and on or before July 15, 1947, request renegotiation of the "Wage Scales, House, of Employment and Working Conditions" of the West Coast Studio Locals . . .

II. Shop Agreement

The Producers severally promise and agree that each and all of their respective employees now or hereafter working in the studios of the Producers in the crafts and classifications of work described in Paragraphs III and IV hereof shall at all times be members in good standing of the International Alliance.

The Producers severally promise and agree during the term of this agreement to employ within the crafts and classifications of work herein described only those workers who are members in good standing of the International Alliance.

The International Alliance promises and agrees to furnish competent men to perform the work and

render the services required by the Producers under the provisions of this agreement, and the agreements referred to in Paragraph IV hereof at such rates and under such conditions as are therein provided for and in accordance with the provisions of said agreements.

III. Scope of Agreement

The crafts and classifications of work subject to this agreement are the crafts and classifications described in the agreements referred to in Paragraph IV of this agreement, and such other crafts and classifications of work in which the Producers shall hereafter recognize the International Alliance as the collective bargaining agent of the employees, or in which the International Alliance shall be designated by the National Labor Relations Board as the collective bargaining agent of the employees.

IV. Wage Scales—Hours of Employment—Working Conditions

The wage scales, hours of employment and working conditions applicable to employees in the crafts and classifications of work subject to this agreement shall be those contained in agreements between the Producers on the one hand, and the International Alliance and the respective locals on the other hand, entered into concurrently herewith or which may hereafter be entered into pursuant to Paragraph I hereof, with respect to such wage scales, hours of employment and working conditions in the crafts

and classifications of work described in those agreements.

V. Bargaining Agency

It is hereby agreed between and among the parties hereto that all of the crafts and classifications of work set forth in the agreements referred to in Paragraph's III and IV hereof constitute during the term of this agreement, an indivisible and integral bargaining unit of which the International Alliance shall during the term of this agreement, act as and be the collective bargaining agency.

Concurrently with the execution of the 1944 basic agreement, there was executed between the same respondent Producers and the Alliance, wage scales and working conditions for Affiliated Property Craftsmen, Local 44; the studio grips, Local 80; the studio laborers, Local 727; and the studio electrical technicians, Local 728. The wage scales were signed by Richard F. Walsh, International President of the Alliance, representatives of the local involved and the Producers' representatives. The Local contracts were, like the 1944 basic agreement, effective as of January 1, 1944. Each of the Local contracts is a technical and specialized form of agreement covering studio working conditions, with numerous clauses dealing with situations peculiar to the motion picture industry. These contracts provide also that in the event any "jurisdictional dispute arises between the Union and any other Union, the subject matter shall be referred to the

respective International Presidents for adjustment."

On March 12, 1945, a strike was called by Local 1421, of the Painters Union. Local 1421, was at that time affiliated with the Conference of Studio Unions, an association of local unions which numbered among its members, in addition, Local 946 of the Carpenters Union, Lodge 1185 of the International Association of Machinists and Local 644 of the Painters Union. During the course of the strike, the Painters, Carpenters, Machinists and other members of the Conference refused to work and picket lines were established around the studios of the respondent Producers.

The day the strike started President Walsh of the Alliance, sent B. C. "Cappy" DuVal, business representative of Local 44, the following telegram:

I have been informed that picket lines have been established around the Hollywood Motion Picture Studios. You are hereby advised that these picket lines are in direct opposition to the best interests of the general membership of the I. A. T. S. E. Therefore instruct your members that they must not in any manner whatsoever violate the Constitution and By-laws of the International Alliance by refusing to pass through these picket lines or to refuse to render service because of them.

On or about the same time Walsh wrote Edwin T. Hill, secretary of Local 44, the following letter:

Many rumors concerning the establishment of picket lines at the Hollywood Studios have reached

this office. So that there will be no misunderstanding as to our members honoring these picket lines, this is to notify your local union that before any members of our local unions refuse to go through these picket lines or refuse to render service, you are instructed to contact this office in order to ascertain if these picket lines are considered legitimate by us.

It must be understood by your local and the membership thereof that the product being produced in these studios bears the label of the I. A. T. S. E. and it is the duty of the General Office to protect that label for the best interests of the entire membership of the Alliance.

At some later date copies of the telegram and letter were sent to members of Local 44. At this time the Alliance had about 10,000 members working in the Hollywood Studios of whom about 1500 belonged to Local 44.

On Sunday, March 18, 1945, Walsh addressed a meeting of Alliance members at the Hollywood Women's Club. Walsh stated that the strike of Local 1421 was a strike against the Alliance and called for the purpose of destroying the influence and position of the Alliance in the studios. Walsh pointed out that the Alliance had organized the motion picture industry and up to sometime in 1919 had enjoyed complete jurisdiction, when the Carpenters Union entered the field, taking over some of the jurisdiction of the Alliance. This created the first open jurisdictional conflict between the Al-

liance and the Carpenters Union. According to Walsh in the period between 1919 and 1933 open shop conditions prevailed in the industry.

As a result of a strike in 1933, the membership of the Alliance dropped to about 165 members because members of the Carpenters Union and the International Brotherhood of Electrical Workers had taken the jobs vacated by striking members of the Alliance. Walsh compared the 1945 strike to the 1933 conditions and foresaw dangers that would result to the Alliance if the membership did not respond to Walsh's request that he was making to them, to keep the studios open. Walsh claimed that jurisdictional issues were at the base of the dispute and that Local 1421 wanted to take over the jurisdiction of the Alliance.

Walsh urged that it was of primary importance to keep the studios in operation; for in the event they were closed the groups represented by the Conference of Studio Unions would then be in a position to dictate the terms on which the strike would close. Walsh argued that the Carpenters Union was determined to control the work which in part was being performed by members of Local 44 and from the Alliance's point of view it was impractical to have set decorators come under the jurisdiction of any other union than the Alliance. Walsh claimed similarly that the Painters Union was engaged in aggressive acts designed to take jurisdiction away from locals of the Alliance. Walsh concluded his lengthy address by stating that the studios had to be kept open and if they were not, the entire juris-

diction of the Alliance would be placed in jeopardy. He ordered Alliance members to do whatever they were required to do in order to keep the studios in operation, for as long as other unions had gone out on strike in violation of their jurisdictional agreements with the Alliance, these acts had canceled any obligation on the part of the Alliance to respect their jurisdiction. Therefore, Walsh ordered all crafts of the Alliance to cross jurisdictional lines insofar as it was necessary in order to keep the studios in operation and Alliance members to do everything that they were requested to do by the Studios, except work in the jurisdiction of those unions that were respecting their contracts and were remaining at work. In response to requests made from the floor that Walsh put his orders in writing, there was subsequently addressed to all members of Alliance studio locals a letter, dated March 19, 1945, which read in part as follows:

This is to officially advise you that until the end of the emergency, created by the unauthorized strike of Painters Union No. 1421, members of I. A. T. S. E. Studio Locals, are not to observe any trade jurisdictional lines in the studios.

This letter, however, is not to be considered an authorization for any member to work in the jurisdiction of any Local Union whose members are observing their no-strike pledge, and are fulfilling their contractual obligations in the studios.¹²

¹²The above findings concerning the remarks made by Walsh at the Hollywood Women's Club are based

C. Employee conduct during the course of the strike.

Although the strike and the employees' attitude toward the strike furnishes a rather uniform pattern, nonetheless differences exist which make it desirable to present the case of each individual in connection with applicable studio practices. The individual cases will therefore be discussed and resolved with an analysis in each instance of the causes which led up to the termination of employment. Later portions of the report will deal with the problems of back pay and reinstatement in those cases where such recommendations are appropriate.

1. Respondent Warner—Case No. 21-C-2564.

The amended consolidated complaint alleged that respondent Warner on or about March 19, 1945, discharged J. Harold Rogers, Lynn G. Batchelder, Paul DeSanctis, Carl H. Gidlund, George M. Hand, Charles Jensen, Leo L. Lamb, Raymond M. Lora, H. C. MacDonald, Donald MacKellar, William J. Simpson, George Stoica, Jr., Robert N. Bonning, William G. White, and Jesse L. Sapp, for the reason that each of them refused to perform the work and take the jobs of striking employees.

upon the testimony of Roy M. Brewer, International representative of the Alliance who was present. Numerous other witnesses testified concerning Walsh's remarks but the clearest exposition is contained in the testimony of Brewer and the undersigned has accepted it. Furthermore, the speech of Walsh sets forth to some extent the background of the situation at the time the strike was called.

All the foregoing employees were, at the time of the strike, members of Local 44 of the Alliance, employed in respondent Warner's prop shop.¹³ The respondents' answer acknowledges that on March 19, the named employees were given notices that they were being placed off pay roll for the reason, "Refused To Do Carpenter Work," as directed by respondent Warner. Respondents' brief admitted the foregoing employees were "discharged."

Certain preliminary observations on matters common to the Warner cases will be made first before taking up each alleged discrimination. These employees worked on Saturday, March 10, 1945, but did not come to work on Monday or Tuesday, March 12 and 13. Aside from William J. Simpson, who worked throughout the week of March 12 the failure of the others to report to work on March 12 and 13, was apparently due to the presence of a picket line around the studio of respondent Warner. They did, however, return to work on Wednesday, March 14, resuming their duties in the prop shop.

On the morning of Saturday, March 17, the rumor spread in the prop shop that prop makers were going to be asked to do the work of carpenters who had either gone on strike or by absenting themselves were supporting the strike of Local 1421. Sapp, a sub-foreman in the prop shop and a leader of the

¹³Local 44, by contract includes within its jurisdiction 21 work classifications and covers a wide variety of specialized skills such as cabinet making, pattern making, ship rigging, sheet metal work, miniature building, and many others.

prop makers, was asked to talk to Francis E. Fuhrmann, head of respondent Warner's technical department, about this rumor. Accordingly, Sapp accompanied by Gidlund and Horner, two co-workers, went to see Fuhrmann and told him of these rumors. Fuhrmann replied that as far as he was concerned none of the prop makers would be asked to go outside of their jurisdiction and no one would be discharged for refusing to do so. Sapp reported this conversation to the rest of the prop makers. About an hour later, Fuhrmann called Sapp and told him that he might have to amend the statement and ask the prop men to go into the carpenter shop on Monday, March 19.

The prop makers came to work Monday morning, March 19, at their accustomed hour. Shortly thereafter William G. White, foreman of the prop shop, was ordered by Fuhrmann to send all of his crew into the carpenter shop. After the men had gathered there, Fuhrmann entered accompanied by Brewer, DuVal and other Alliance representatives. Brewer was the first to address the assembled employees. He stated that Alliance members were expected to go into the carpenter shop and perform the work of carpenters or to do any other work required by the studios, under penalty of discharge by the studio for refusal to do so. Brewer stated further that Walsh had told the respondent Producers that he would keep the studios running during the "trouble" and that the Conference of Studio Unions was trying to take over the entire industry.

At the conclusion of Brewer's remarks, Fuhrmann told the men to return to their work and that in time they would be asked to take the jobs vacated by the strikers.

Shortly after the gathering, Fuhrmann asked White how the prop men felt about this turn of events. White told Fuhrmann that he believed that the men would refuse to go into the carpenter shop. Fuhrmann then asked if they would take blue slips¹⁴ rather than work as carpenters and White replied that he was of the opinion that they would choose this course. Fuhrmann stated, "That is the way it will be." Around noon, Fuhrmann called all the prop men together, told them that they were now expected to go into the mill and perform work as carpenters and for their refusal to do so they would be eliminated from the studios. He stated further that the prop men were expected to build sets because they were then of paramount importance in the production of motion pictures.¹⁵ Fuhrmann's warning that for refusal to perform carpentry work the prop men would not be employed by Warner's nor would they be permitted to work in the industry again was repeated by a number of witnesses and it is found as a fact that Fuhrmann made this statement. Sapp inquired if it would not be wise to get

¹⁴The off pay-roll notice was referred to throughout the hearing as a "blue slip."

¹⁵Members of the Carpenters Union made the floors, the ceilings and the walls of any desired set. Members of Local 44 made the props which were placed upon or in the set.

a show of hands and to find out whether the prop men would refuse to go into the carpenter shop. In response to this inquiry, all the prop makers, some 38 in number, indicated that they would refuse to comply with Fuhrmann's direction. Whereupon Fuhrmann said that lots of prop work remained to be done and ordered the men to return to their jobs. Following this refusal, Fuhrmann reported the incident to Carroll Sachs, respondent Warner's labor relations manager, who instructed Fuhrmann to terminate the employment of the prop makers. A termination of employment notice was then made out and shortly before the close of the shift, they were distributed to 38 prop makers.¹⁶

In its brief respondents acknowledge that respondent Warner delivered to the employees named above, "blue slips which it intended should have the effect of discharging such insubordinate employees" and they were "so discharged," despite the contrary contention at the hearing that the prop makers were placed "off payroll" by reason of their refusal.

At about 6 p. m. on March 19, White received a

¹⁶In this connection Simpson who had not attended either the Brewer meeting or the Fuhrmann meeting and who had not up to that time indicated a refusal to perform carpentry work was along with the other prop makers given a blue slip. Fuhrmann admitted that he did not know whether Simpson had refused to perform carpentry work but he treated the group as a whole since they indicated at the meeting with him that they would not perform carpentry work and all the prop makers were issued blue slips.

telephone call from Fuhrmann requesting him to report to the studio. On arrival White found all the prop makers were present except Sapp and Fuhrmann and Duval were likewise there. Duval read to the assembled prop makers the directive issued by President Walsh advising the prop makers that, until the end of the emergency created by the strike of Local 1421, members of Alliance studio locals were not to observe "trade jurisdictional lines" in the studios. Horner, one of the prop makers and Local 44 steward on the lot, asked Duval, "Why make scabs out of us? Why don't you go out and hire some professional strike breakers and leave us fellows alone?" Somebody made a motion that Duval leave the meeting and he did.

Fuhrmann then took up the discussion, urging the prop makers to keep the studio "rolling" regardless of what they were asked to do. Someone suggested that other crafts represented by Local 44¹⁷ be asked to come in on the "deal" as well as the prop makers. The prop makers decided that if they could get the other crafts represented by Local 44 together, to consider this, they felt certain that the membership as a whole would be opposed to working in the carpenter shop and that the prop makers, as a minority group, thus would be protected. Fuhrmann was told that if he would call all of the Local 44 crafts together at 9 o'clock the next morning the prop makers would return and ask the en-

¹⁷This would include, for example, such classifications as upholsterers, seamstresses, greensmen, etc.

tire membership on the Warner lot whether they would work in the mill, and the prop makers would abide by the majority decision of the membership. Apparently this was agreeable to Fuhrmann whereupon all the prop makers left the premises. Late that night or very early on the morning of March 20, Fuhrmann called a number of the prop makers at their homes and told them that he could not keep this agreement and that he expected the prop makers to come to work on March 20, as carpenters. When Fuhrmann called Raymond M. Lora, he told him that most of the prop makers that he had telephoned had agreed to report that morning for work in the carpenter shop. The prop makers met in the morning, again canvassed the situation and found that no one had agreed to go in and it was decided that none of those who had gathered there would report for work in the carpenter shop.

On the morning of March 21, Fuhrmann called White and asked him to report to this office. Upon arriving White found Horner and Gidlund present. Fuhrmann asked if there was any change in sentiment among the prop makers and requested White to call a meeting on the lot that afternoon of all the prop men to again consider the demand to the prop makers to work as carpenters. White called the meeting and approximately all those issued blue slips reported that afternoon. At the meeting the men reaffirmed their decision not to work as carpenters. They indicated their willingness, how-

ever, to return to their own work as prop makers. Fuhrmann was so advised.

On March 22, James Peck, a sub-foreman, held a meeting of all prop makers at his home so that they could consider again the question of working. White stated that he saw no reason to change the decision and in any event, the group should await the arrival of Sapp, who was meeting with Carl Cooper, seventh international vice president of the Alliance. Sapp arrived and reported no new developments as a result of his interview with Cooper, and that the Alliance request to its members to cross jurisdictional lines still stood. By a vote of 19 to 16, it was decided to return to work as carpenters. It appears that three prop makers, from the afternoon shift, who should have been at work at the time the meeting was held, participated in the vote. There is no record evidence that these three participants had received blue slips and had indicated any refusal to go into the carpenter shop. Fuhrmann was then informed that all the prop makers would be in for work the next morning. It appears that about 24 of the prop makers reported for work and about 12 including complainants herein named, refused to go into the carpenter shop and except where differently indicated in this report, refused thereafter to work in the carpenter shop during the period of the strike.

The foregoing findings are based principally upon credible and for the most part uncontradicted testimony of White, Sapp and Lora corroborated by the

testimony of numerous other witnesses. The foregoing findings also complete the resume of the joint action taken by the prop makers who refused on March 19, to go into the carpenter shop and were on that day discharged. Accordingly, the undersigned will now pass to the cases of the individual complainants on respondent Warner's lot.

Jesse L. Sapp, sub-foreman, in the prop shop had been employed for about 9 years. Under the Local 44 contract with the producers, Sapp was classified as a prop and miniature gang boss. Sapp had spent his entire time in the industry in property work and the building of miniatures. In addition, he was the chief lay out man in the prop shop and did the lay out work on a complicated prop such as a B-17 Flying Fortress. Sapp has never been employed in the carpenter shop at respondent Warner's. Sapp has been a member of the Alliance since 1936 and of Local 44 since its organization in 1939. He was expelled from the Alliance by sentence dated May 31, 1946 of which respondent Warner received notice on June 14, 1946.

Sapp testified as follows concerning his reasons for refusing to work in the carpenter shop: "... in the first place, my conscience wouldn't allow me to be a scab; and in the second place, it was in direct violation of the oath I took when I joined the International Alliance, Local 44." Sapp's refusal to perform carpentry work was maintained throughout the strike. After the termination of the strike and about November 1, 1945, Sapp, White and a

small committee of prop makers interviewed Brewer and asked him if they had his consent to return to work. Brewer replied that this decision awaited the return of President Walsh to Los Angeles. Sapp signed the Local 44 call book about November 9, 1945, and thereafter received a call to report to respondent Columbia but due to an illness was unable to accept the offered post.¹⁸

On November 24, 1945, Local 44 sent Sapp the following telegram:

Please notify this Local Union if you are available to accept employment in positions which we may have to offer or advise what you will accept.¹⁹

Sapp replied that he would accept the job that he held on March 12, 1945, at respondent Warner's. The wording of the telegram makes it clear that no particular job was being offered to Sapp.

William G. White, had prior to March 19, 1945, been employed by respondent Warner for about 9½ years. At the time of his discharge he was a fore-

¹⁸Alliance locals maintain call books upon which a member could enter his name for employment by telephone or by appearing in person at the union office. Customarily in the industry, when the days work is done, the employee returns to work the next day, unless notified to the contrary or given a lay-off slip. Regular crew members are called back to work by the studio or told when to report. Temporary employees or those laid off desiring work elsewhere have their names placed on the union call book.

¹⁹Copies of this telegram were also sent to Simpson, Lamb, Gidlund, Hand, Batchelder, Ames, Lora, MacDonald, and Hentschel.

man and in charge of the prop shop on the morning shift. White supervised from between 75 to 100 employees. White had never worked in the carpenter shop.

Around 1930, White had joined Local 946 of the Carpenters Union, but at the time of his discharge and for some time prior thereto was a member of Local 44 of the Alliance. White testified that had he gone into the carpenter shop on March 19, he would have had to build sets or parts of sets that the carpenters had built and had been building for years. Although White was aware of President Walsh's instructions to Alliance members to cross jurisdictional lines he nonetheless, refused to work in the carpenter shop, because as he testified, he would not scab and because of his oath as a union member. He has never refused to perform his customary work in the prop shop.

White applied for reinstatement on about November 6, 1945, by telephoning James Gibbons, superintendent of the prop shop, who referred him in turn to Fuhrmann. When White asked for his old job Fuhrmann said there was nothing that could be done and that White would have to see DuVal or Brewer. White also wrote respondent Warner a letter asking for his old job to which no reply was sent. White was one of the committee that interviewed Brewer on or about November 1, in an effort to secure Brewer's help in reinstatement.²⁰ Some-

²⁰Brewer testified that he told the committee that they were not entitled to reinstatement on the jobs

time in November, White signed the Local 44 call book, but never received a call.

George Stoica, Jr., first started to work for respondent Warner in 1929. During the last 11 or 12 years of his employment Stoica was employed in the hardware department of the prop shop where he prepared and fabricated such props as door locks and knobs and railroad and ship hardware. Stoica never performed carpentry work or built sets. Stoica did not receive his blue slip on the afternoon of March 19, due to the fact that he had left the lot before the shift ended. He was discharged when he returned to the lot for the 6 o'clock meeting with Fuhrmann and the other prop makers. On March 19, 1945, Stoica was a member of Local 44. He was expelled by sentence dated May 31, 1946, of which respondent Warner received notice on June 14, 1946. Stoica knew of President Walsh's instructions to all Alliance members to cross jurisdictional lines. He was not individually asked to perform carpentry work by either Fuhrmann or Gibbons. He admitted that he would not have done so if asked, and he was one of those, who along with the other prop makers voted not to go into the carpenter shop on March 19.²¹

they held on March 12, but they were entitled, as was any other Alliance member in a like position, to any job they were willing to accept and that he would do what he could to see that jobs were obtained as quickly as possible.

²¹Stoica testified as to his reason for refusing to work in the carpentry shop as follows: "my work

During the course of the strike, Stoica saw Fuhrmann on a number of occasions and asked for his old job. He was told that unless he would go to work in the carpenter shop he could not work again for respondent Warner. After the strike and on November 10, 1945, Stoica asked Fuhrmann for his job and was told to sign the Local 44 call book and in the event prop makers were needed he would be returned to work. Stoica asked Fuhrmann whether he could have a job as a hardware man and Fuhrmann replied that he had one coming in. On one occasion, Carroll Sachs told Stoica that it would be unfair to the men who had cooperated during the strike and had done carpentry work to reinstate him. Sometime in January 1946, Brewer told Stoica that the Alliance was not keeping the prop makers out of their jobs and that Stoica could return to respondent Warner the next day if he could get his job back. Stoica did sign the Local 44 call book about November 9, and sometime thereafter received a call at respondent Columbia but refused the call.

Lynn G. Batchelder was employed by respondent Warner as a prop maker for about a month and a half prior to March 19, 1945. He received the blue slip on that date from Gibbons. At this time Batchelder was a member of Local 44. On June 14, 1946, respondent Warner was notified that effective June

as a hardware man brought me in contact with carpenters and set designers, and I felt that if I went in there and done carpenter work that when the strike ended that I would not be able to run that department efficiently."

17, 1946, Batchelder was suspended by Local 44 for 6 months and fined the sum of \$300. It was stipulated by and between counsel for the Board and the Alliance that the sentence imposing the fine also provided that nonpayment of the fine within 2 months automatically expelled the member fined from Local 44. Batchelder not having paid the fine was thus expelled. Batchelder's dues, however, had been paid through to October 31, 1946.

Batchelder testified as follows concerning his reasons for refusing to work in the carpenter shop between March 19 and October 31, 1945: "Because I don't care to be a scab. I don't care to do the other fellow's work. I don't feel that the working man has any right to go in and do the other fellow's work. They won't do themselves any good and they won't do Warner Bros. any good and they won't do their country any good."

On October 31, 1945, Batchelder was one of many prop makers returning in a group seeking reinstatement and not permitted to enter respondent Warner's lot. The following day Batchelder called Fuhrmann and asked if he had a call and was told that there was no call for him and to stand by. He did not put his name on the Local 44 call book after October 31, 1945, nor did he try to obtain work elsewhere in the industry. He did, however, receive the telegram referred to above from Local 44 on November 24.

George M. Hand was prior to March 19, 1945, employed by respondent Warner for about 2 years

in the prop shop where he engaged in special effects work and built miniatures. Hand had never worked in the carpenter shop and prior to March 19, had never been asked to work there. Hand was given his blue slip on March 19. He was a member of Local 44 since its organization in 1939 and had paid his dues to November 1, 1946, but was suspended from the Union for a period of 6 months effective June 17, 1946, and fined the sum of \$300. Not having paid the fine he was later expelled. Respondent Warner received notice of the suspension on June 14, 1946. Hand acknowledged that at no time during the strike was he willing to perform carpentry work. He testified that he refused to perform carpentry work because he did not want "to be a scab," and because he "didn't want to take jobs away from other men or other crafts and work which did not belong to us."

About November 1, 1945, Hand sought reinstatement by telephoning the lot. He spoke to someone, not identified in the record, who told him that there was no work available and that he should get a clearance from Local 44. Hand signed Local 44's call book in November 1945 and thereafter secured a position in the industry working steadily up to about June 1946.

Raymond M. Lora was prior to March 19, 1945, employed by respondent Warner for about 2 years as a prop maker doing special effects work. Lora was given his blue slip along with the other prop makers. He was a member of the Alliance but was

expelled from Local 44 on May 31, 1946, of which respondent Warner received notice on June 14, 1946.

Lora gave the following as his reasons for refusing to go into the carpenter shop: "My card didn't call for me to do carpenter work, and therefore there is no union that is authorized to have you work other than what your card calls for, and I just couldn't go in there and scab, you know, and scab on fellows that live right in my immediate neighborhood. Eight or nine of them live right out there in Burbank right with me, and I couldn't go in and do their work while they were out there in that picket line. I couldn't do that."

On October 31, 1945, Lora, accompanied the other prop makers who sought reinstatement at respondent Warner's and were denied entrance to the lot. Lora sought out Fuhrmann and asked when they would be permitted to enter and was told by Fuhrmann that the prop makers would not be hired. Lora asked Fuhrmann to speak to Carroll Sachs but no word came back from Sachs as to what was to be done with respect to the prop makers. On November 6, Lora called Gibbons and asked when he and Hand were going to be reinstated and was informed by Gibbons to get the matter straightened out with Local 44. Lora went on Local 44's call book in November and thereafter found work from January to March of 1946.

Robert N. Bonning was prior to March 19, 1945, employed for about 2½ years by respondent Warner. Bonning was a prop and miniature gang boss

working on all kinds of props but specializing in metal work. Bonning was given his blue slip on March 19. He was, and still is, a member of Local 44 not having been suspended or expelled from the Union. Bonning testified as follows concerning his reasons in refusing to work in the carpenter shop: "Well, one has already been stated, the scabbing. That was one reason. Another reason was all machines in the mill have signs on them: 'To be operated by machine operators only.' There was a state compensation law that I don't think would protect us if we operated them. . . . I have a lot of personal friends that is carpenters. I chum around with them."

Following the conclusion of the strike, Bonning called Gibbons and asked for his job and was referred to Fuhrmann. Fuhrmann told Bonning that nothing could be done for him and that he would have to clear with his union. Thereupon, Bonning spoke to Secretary Hill and asked about his job but was told that Brewer had not made up his mind. Bonning has since found regular employment in the industry, and he testified that since May 1946, he no longer desired reinstatement to his old job.

Carl H. Gidlund was employed by Warner since 1929. He was transferred to the prop shop in 1943, where he specialized in sheet metal work. Gidlund had never worked in the carpenter shop. He attended the meeting addressed by Brewer, but did not attend the later meeting addressed by Fuhrmann for he was told by Gibbons that he was not

concerned with the meeting and was not equal to the kind of work that the other prop makers had been asked to do. On the afternoon of March 19, Fuhrmann told Gidlund that he was going to be asked to do carpenter work. Gidlund refused to do so, because he had never done it before, had no tools for the trade, and as he testified he would not "scab." Whereupon Fuhrmann said that he was sorry but "that's it." Thereafter Gidlund was discharged.

Gidlund worked both during and after the strike in the industry but at the conclusion of the strike he sought his old job by telephoning Gibbons. Gibbons told Gidlund to await a call and he received the same story from Fuhrmann, to whom he also spoke. On November 24, Gidlund received the telegram from Local 44 to which he replied that he was willing to accept the job from which he was "fired March 12, 1945." Gidlund, an Alliance member, was by sentence of May 31, 1946, and served on respondent Warner on June 14, 1946, expelled from Local 44.

Donald MacKellar was employed by respondent Warner for about 7 months prior to the 1945 strike. Most of his time was spent doing plastic work in the prop shop. He refused to work in the carpenter shop and was discharged. MacKellar was a member of Local 44 and in addition has maintained membership in the Carpenters Union off and on over a period of years.

MacKellar testified as follows concerning his rea-

sons for refusing to work in the carpenter shop: "One was that I would have been going under a threat, which I do not like. . . . The other was, it isn't my principle to take the job of another man that is out on strike. I have been brought up as a union man all my life, and I still have the same ideas that were taught me as a boy what a union man is, and I can't help it. I can't change it." He did not work during the strike but upon its conclusion tried unsuccessfully on about six occasions to get his job back at respondent Warner. He was finally rehired about August 1, 1946, but quit voluntarily about September 7, 1946. This latter quitting is not part of the instant proceeding.

Paul DeSanctis has been employed in the motion picture industry for about 20 years, the last 4 or 5 of which was spent with respondent Warner in its prop shop. DeSanctis is a skilled cabinet worker. DeSanctis along with the others, refused to do carpentry work and thereafter received his blue slip.²² At the conclusion of the strike DeSanctis along with Charles Jensen another prop maker called upon Fuhrmann seeking reinstatement and they were instructed to clear it with Local 44. Thereafter DeSanctis saw DuVal about reinstatement and the next day was given a call at respondent Warner and returned to work on November 7, 1945. DeSanctis

²²The Board alleged that DeSanctis was refused reinstatement following discharge. It appears that DeSanctis was rehired in November 1945, and the Board's motion to amend its complaint accordingly, was granted.

was working for respondent Warner at the time of the hearing.

Leo L. Lamb was prior to March 19, 1945, employed by respondent Warner for about 2 years. Most of this time had been spent as a gang foreman on rigging and submarine work under the jurisdiction of the prop shop. Lamb refused to do carpentry work and received his blue slip on March 19, 1945. Lamb was a member of the Alliance having joined Local 44 sometime after 1942. He also was, and had been for some 20 years, a member of the Carpenters Union. In June 1946, Lamb was expelled from the Alliance.

On October 31, 1945, Lamb applied for reinstatement and was told that there was no jobs available for prop makers. Lamb then talked to Gibbons who stated that the "case" of the prop makers who had refused to perform carpentry work had not been settled; that there was no opening for Lamb and referred him to Local 44. When Lamb spoke to Gibbons and Fuhrmann thereafter, he was in each instance referred to Local 44. At this time Lamb was a member in good standing of Local 44 and was ready and willing to return to his job. On November 24, Lamb received the telegram, heretofore referred to, and he replied that he was willing to accept the position that he held on March 12.

William J. Simpson was in charge of the special effects department in the prop shop from 1937 to 1945. Simpson worked the entire week of March 12, 1945, not respecting the picket line and came to

work on March 19, 1945. He did not attend either the Brewer or Fuhrmann meeting. Nonetheless he was discharged at the close of his shift. When he received the blue slip he asked Gibbons why he was given it since he had not been asked to do any carpentry work. Gibbons did not answer the question. After Simpson was discharged he was asked to do carpentry work for the first time at the meeting held that evening with Fuhrmann. Fuhrmann acknowledged that he treated Simpson as though he had refused to perform carpentry work but could not testify with certainty whether Simpson had actually refused to perform the work. It seems clear that although prior to discharge Simpson had not indicated a refusal to perform carpentry work, he did indicate at the evening meeting with Fuhrmann that he would not perform any work outside of his jurisdiction.

Simpson was and still is a member of Local 44. He did not work for respondent Warner after March 1945, although he tried on several occasions to get his job back.

Simpson testified that he did not ask for his job back at Warner until after October 31, but that during the strike he would have returned as a prop maker. In May 1945, Simpson became physically incapacitated and apparently was not well enough to work until January 1, 1946, actually returning to work elsewhere in March of that year. Simpson acknowledged that he was unable to work during the strike because of his illness.

Charles Jensen did not testify due to his absence in Europe at the time of the hearing. However, it was stipulated by and between counsel for the Board and the respondents that Jensen, if called as a witness would have testified that: (1) he was employed by respondent Warner from November 1944, to March 19, 1945, in the prop department and that Gibbons was his foreman; (2) he was a member of Local 44 of the Alliance; (3) he did not work on March 12 or March 13, but reported on March 14 and finished the week; (4) on March 19, 1945, he attended the Fuhrmann meeting when he was asked along with others to work in the carpenter shop and that he with the others refused to do so; (5) he was given a blue slip; (6) he was now and has been since February 1946, employed by respondent Twentieth Century, and he no longer desired reinstatement.

The foregoing covers the cases of the prop makers employed by respondent Warner named in Case 21-G-2564. There is yet to be considered the cases of those named therein but who worked at different occupations and are members of different locals.²³

2. Other Warner Cases

The amended consolidated complaint alleges that on March 19, 1945, respondent Warner discharged

²³The case of H. C. MacDonald, in Case 21-C-2564, was dismissed on motion of the Board at the hearing.

Charles J. Larson and Fred Seward²⁴ and thereafter refused to reinstate them because they refused, along with others, to take the jobs of striking employees.

With respect to John C. Goudie, Kenneth B. Coffey, Willis F. Howe and Paul L. Stanley, the amended consolidated complaint alleges that respondent Warner, on and after October 31, 1945, refused to reinstate these named employees to their former positions because they refused to cross picket lines during the strike and engaged in concerted activities for their mutual aid and protection.

Charles J. Larson started to work for respondent Warner in 1934. On and after 1941, and up to March 19, 1945, Larson was employed as a grip. Larson has been a member of Local 80 of the Alliance since 1942, and at the time of the hearing was in good standing.

On March 19, 1945, Tull, foreman of the grip gang, asked Larson to erect a set on the stage, work which up to this time had been performed by carpenters. Larson refused to perform this work and was then told by Tull: "If you don't do carpenter work, go over to the grip room." Larson testified and it is found that, when Tull requested him to erect the set, he remarked to Tull that on a previous occasion when he attempted to perform work of a similar nature, he had been instructed not to do the job because such work was under the carpenter's jurisdiction. Larson saw Ketcham, head of the grip department, and asked for discharge and availability slips. Ketcham however stated that too many of

²⁴Seward's case is discussed hereafter.

them had already been issued and told Larson: "You just go home."

On November 12, 1945, Larson called the grip office to inquire about a call and was informed that there was no work for him. About December 2, Larson asked Ketcham for a call and was told that he would have to inquire about it at the union. Larson accompanied John C. Goudie, when the latter had a conversation with Barrett, referred to hereafter, wherein Barrett stated that Larson, as well as Goudie, would not be rehired by respondent Warner because of agreements made between President Walsh of the Alliance and the Producers that the Producers would not reinstate those individuals who refused to pass picket lines during the strike.²⁵

Although Larson signed the Union call book about November 14, 1945, he made no particular effort to find another job. He testified that he "figured" that he was "entitled to go back there."

John C. Goudie started with respondent Warner as a carpenter in 1928, was injured in 1934, and returned to work as a grip in 1936.²⁶ When he

²⁵Larson did not strike and never joined a picket line. He apparently refused to pass through the picket line on and after March 19, 1945.

²⁶A grip performs rough carpentry work such as the erecting of platforms for lighting sets and at times assists the cameraman in shooting pictures. A grip has also been defined as one who performs all manual labor work in and around a motion picture studio concerned only with the handling of scenery parts. See Dictionary of Occupational Titles, Part I, U. S. Government Printing Office, Washington, D. C. (1939).

went to work as a grip he became a member of Local 80 of the Alliance.

Goudie worked at respondent Warner's during the week ending March 10, 1945. He did not work on March 12, the day the strike started, because as he testified: "I went to the studio and they had a picket line across the entrance, so I didn't go through."

At the conclusion of the strike Goudie reported for work because of his understanding that all who had been out during the strike, whether on strike or not, were to return to work. He saw Ketcham, and asked for a call but Ketcham stated that there was no work for him. Goudie was a careful and precise witness. He testified credibly and without contradiction, and it is found, that on or about November 2, 1945, Ketcham told Goudie, that if Barrett, the business agent of Local 80, would give Goudie a release and telephone Ketcham to that effect, Ketcham would give Goudie a call. Barrett told Goudie that President Walsh of the Alliance and the Producers had agreed not to hire anyone who refused to go through picket lines and there was nothing he could do for him under the circumstances. Goudie made further efforts at reinstatement and in January 1946, asked Bill McConnell, head of the scenic department to help him get his job. On a later occasion, McConnell told Goudie that he had sought the help of Alliance Vice-President Cooper but that Cooper would do nothing for Goudie because he had filed charges against respondent Warner. On Jan-

uary 21, 1946, Barrett told Goudie that even if a call did come from respondent Warner for a grip, Goudie would not get the call because of the pending charges. Goudie has never received a call to return to respondent Warner through Local 80.²⁷

Seward, Coffey, Howe and Stanley

After the Board had concluded its case, counsel for the respondents moved in the midst of their defense to dismiss the complaint against Seward, Coffey, Howe and Stanley on the ground that no charge had been filed on their behalf. This procedural aspect has been adverted to above and as there indicated, the motion was denied. It appears without a question that no charge was ever filed on behalf of Stanley. With respect to Seward, Coffey, and Howe however, their attorney did present a verified charge to the Board's Regional Office, and for some unknown reason the charge was never formally docketed. However, with respect to these three individuals, counsel for the respondents was aware of the discrimination asserted and did discuss the cases with a Field Examiner who represented the Regional Office.

The technical and procedural irregularities,

²⁷The above findings concerning Goudie's efforts at reinstatement are based upon his credible and uncontradicted testimony, despite the fact that the said testimony is largely hearsay in character. Ketcham, McConnell and Barrett did not testify. Moreover the testimony impressed the undersigned as reasonable and worthy of belief.

brought to light as a result of respondents' motion to dismiss, were not, in the undersigned's opinion at the time of the hearing, of sufficient weight to warrant dismissal of the complaint in those respects. Upon further consideration of the matter the undersigned is still of the same opinion. The Act does not preclude the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.²⁸ It has likewise been held that rulings permitting an amendment to a complaint during the course of the hearing, by adding another employee to those alleged to have been wrongfully discharged, affords no basis for challenging the validity of the hearing.²⁹ In the instant proceeding counsel for the respondents had notice by service of the original consolidated complaint, dated July 19, 1946, that the Board alleged discrimination on the part of respondent Warner against Seward, Coffey, Howe and Stanley. Moreover, the Board was permitted and did without objection present its case with respect to them and it was not until the respondents reached their defense, that the motion first was made to dismiss because of the absence of the charge. For these reasons, therefore, the undersigned is of the opinion that the respondents had

²⁸National Licorice Co. vs. N. L. R. B., 309 U. S. 350, 368, 369.

²⁹Consolidated Edison Co. vs. N. L. R. B., 305 U. S. 197, 224, 225.

ample notice to prepare their defense, that adequate opportunity was given at the hearing for the trial of the issues raised in the amended consolidated complaint against these individuals, and that the respondents were not prejudiced by the rule denying the motion to dismiss. These cases therefore, will be discussed on their merits.

Fred Seward started to work for respondent Warner in 1934 as a grip. He was and still is a member of Local 80 of the Alliance.

On either Monday morning, March 12, or 19, 1945, Brewer addressed all the studio grips and told the assembled men that they would be expected to do carpentry work in order to keep the studios running. Shortly after, Fuhrmann asked the grips to keep the studios in production and to do everything that was asked of them. On March 19, Ketcham told Seward that he had to go into the mill, whereupon Seward, walked to the grip room, took off his overalls, and told Ketcham that he did not feel right about doing carpentry work; he was not going to do it; and was going home. Seward added that it was not right for him to do carpentry work and that it was the same as "scabbing." Ketcham instructed Seward to report to Fuhrmann. On reporting to Fuhrmann, Seward said that he did not feel right about going into the carpenter shop and that he would like to have a blue slip. Fuhrmann told him that he could not give him a blue slip and that he would have to report to his union. Thereafter, and during the course of the strike, Seward

did not work for respondent Warner. Seward was not willing to return to work to perform carpentry duties between March 19 and October 31, 1945.

The day the strike was over, Seward sought out Ketcham and was told that there was no job for him but that he could leave his telephone number and he would be called. Seward never received a call thereafter from respondent Warner. He went on the Local 80 call book after the end of the strike, became ill sometime later and was hospitalized.

Kenneth B. Coffey has been employed in the motion picture industry since 1914 and started to work for respondent Warner in 1922. Coffey is a lamp operator. He has been a member of the Alliance since 1911, and at the time of the strike belonged to Studio Electrical Technicians, Local 728.³⁰ Coffey reported for work on Monday, March 12, observed the picket line and refused to cross it.

Coffey did not work in the industry during the strike, but on October 31, 1945, presented himself at the gate seeking reinstatement. He was with Stanley and Howe, other lamp operators, and they were told that there was no call for them on that day. Sometime in November, Coffey asked Jack Ohl, assistant chief electrician, why the "boys" could not return to work. Ohl answered that it was,

³⁰Coffey was a member of a construction local of the International Brotherhood of Electrical Workers, A. F. of L. up to sometime in 1945.

“somebody higher up than I am that is keeping you fellows out.”³¹

The respondents' answer respecting Coffey consists of a general denial. At the hearing, however, L. M. Comes, respondent Warner's chief electrician, testified concerning Coffey's lack of ability due principally, according to Comes, to his addiction to the use of alcohol. Comes testified generally that Coffey was an “old timer”; everybody felt sorry for him; as long as he could get around he was kept on the job; he had been warned several times about drinking; and, if he did not stop drinking he would be dismissed. This was over a period of about 2 to 3 years prior to March 1945. Despite Comes' intimate knowledge of Coffey's habits over a period of some 28 years he had never discharged him. He admitted that he knew that Coffey had requested work about October 31, 1945, but testified that there was no need for him at the time.

The undersigned is persuaded that the Labor Committee's instruction issued by Pelton on October 31, 1945, to all of the Producers, rather than habits condoned over a long period of years, was the true cause of respondent Warner's refusal to reinstate Coffey. This instruction is herein set forth:

³¹Ohl denied this testimony. The denial is not credited because the substance of the conversation is consistent with instructions issued on October 31, by Pelton, to all of the Producers and which is the subject of comment hereafter.

Additional Instructions No. 2—Issued Oct. 31, 1945,
4:30 p.m.

Members of I. A. T. S. E. who bolted from their locals and/or refused to come to work during the strike, shall not return to their regular I. A. jobs without approval of the I. A. local concerned. If you have called any of these people by mistake, explain the error to the individual and lay off such people.

I. A. replacements who were borrowed from any of the original 12 I. A. locals shall not return to work in their respective locals without making advance arrangements with the Business Agents.

/s/ F. E. PELTON.

When questioned concerning this document, Comes acknowledged, that he had received instructions that men who did not work during the strike were to report to their locals before employment.³²

³²Brewer testified that Herbert Sorrell, president of the Conference of Studio Unions, was interpreting the directive that settled the strike so as to require the reinstatement of those who observed picket lines during the strike. Brewer, accordingly told Carroll Sachs of respondent Warner that the Alliance would not agree to the displacement of any of its members by the reinstatement of these men; that the Alliance had filled the jobs at a difficult time and it would not agree to the displacement of the men supplied; that the rights of the job holders as well as the job seekers were to be determined by the Alliance and the Producers and not by Sorrell and the Producers. He testified further that he had no objection to the rehiring of the job seekers

Comes never discharged Coffey or advised Local 728 that he no longer desired to have him on the lot.

Willis F. Howe was first employed by respondent Warner in 1938 as an electrician. Howe was and is a member of Alliance Local 728. Howe reported for work on Monday, March 12, saw a picket line around the studio and did not go through the line. He did not report for work at any time thereafter during the course of the strike.

On October 31, Howe reported for work accompanied by Coffey and Stanley. They were informed that there was no call for them. On November 1, 1945, Howe spoke to Ohl and was told that things were "awfully slow." At the same time, Ohl acknowledged that some 48 permit men were at work but that the refusal to reinstate Howe was due to conditions beyond Ohl's control.³³ Sometime later in November, Howe spoke to Robert C. Amy, a call clerk in the electrical department, and was told by Amy that his request for reinstatement would be taken care of in time.

Paul L. Stanley was first employed by respondent Warner in 1926 as a lamp operator. He is a member of Local 728 of the Alliance.

Sometime in September, 1945, Comes asked Stan-

but it must not be in a way that would displace an Alliance member unless in accordance with "our rules and regulations."

³³Ohl denied this conversation with Howe. The undersigned has credited Howe's testimony for the same reasons as indicated in footnote 31, pertaining to a similar denial of a conversation that Ohl engaged in with Coffey.

ley to go into the carpenter shop. Stanley refused, saying that he did not believe it was right to do so. The matter apparently was dropped. Stanley worked after this incident until October 1, when he stayed out for the balance of the strike. On October 31, Stanley accompanied by Howe, Coffey and others reported to the studios and sought a call but they were informed that they would not be hired.

About 2 weeks after the strike ended, Stanley received a call through his local to report to respondent Warner. He worked one day. On November 29, Stanley telephoned the studio and asked Amy, the call clerk, to punch his time card for him. Amy refused to do so and, on investigating the matter, discovered that Stanley had also checked in on November 28, without receiving a call. Amy reported the matter to Comes who thereafter informed Stanley that if he got a call through his local, Comes would hire him, but that he would not place him on the regular call list. Respondent Warner never called Stanley after his request to Amy. Stanley worked irregularly for other Producers until March or April, 1946, when he decided that he "had enough." Thereafter, Stanley went into business for himself and from that time no longer wished reinstatement to his old position at respondent Warner.

In the undersigned's opinion the refusal to reinstate Stanley on October 31, stems from Pelton's instruction to the Producers, previously mentioned. It does appear that Stanley was given calls at respondent Warner and other Producers following the

termination of the strike. Sufficient reasons exist, in the undersigned's opinion, for respondent Warner's refusal to place Stanley in his old job on and after November 29, 1945, because of his improper request to Amy on that date to punch his time card.

3. Respondent Warner—Case No. 21-C-2660.

J. Harold Rogers was first employed by respondent Warner in 1921. For a number of years thereafter, he was assistant to Louis Geib head of the Technical Department. At other times Rogers worked as a carpenter but in 1943, he became a prop maker and was transferred into the prop shop. Rogers has been a member of the Alliance since 1919, and was at the time of the strike a member of Local 44.

Rogers was one of the prop makers who on the morning of March 19, 1945, heard Brewer and Fuhrmann address the prop makers and who thereafter refused to perform carpentry work as requested by Fuhrmann. He was given a blue slip similar to those issued to the other prop makers.

On October 31, Rogers sought reinstatement. After a group of carpenters had passed through the gate, Rogers and other prop men came to the window where Fuhrmann stood. Fuhrmann stated the question of their employment had not been settled and they could not return to work. About November 2, 1945, Rogers telephoned the studio and was told that there had been no ruling on the question. Rogers signed the call book on November 3, and

thereafter received numerous calls from his local to work at other studios, all of which he turned down, because they were not at respondent Warner's. Rogers was reinstated on February 12, 1946. He worked for about 1 week and then asked Fuhrmann for an indefinite leave of absence which was granted. Rogers no longer desires reinstatement.

4. Respondent Columbia—Case No. 21-C-2505.

The amended consolidated complaint alleges that respondent Columbia discharged Joseph P. Cuccia on or about April 3, 1945, and thereafter refused to reinstate him because he refused to perform the work of striking employees and engaged in concerted activities with other employees. Respondents' answer is a general denial.

Cuccia was employed by respondent Columbia from June to August 1942, when he was inducted into the United States Army. He returned to work for respondent Columbia in May 1943, after his honorable discharge. When Cuccia was rehired he told Tom Stevens, his superior, that his army discharge was due to defective eyesight and sinus trouble. Cuccia was a laborer and a member of Studio Laborers and Utility Workers, Local No. 727. It was his job to stand by with shooting companies, sweep the stages and after sets had been struck by the grips, he would assist in loading the sets onto trucks for storage. When a company was not engaged in shooting a picture, Cuccia "would kind of clean up . . ." Cuccia never did any painting while employed by respondent Columbia.

About March 27, 1945, Cuccia was ordered to stage 4, where he found 10 to 15 members of the local together with Al Erickson, the business representative, and Tom Stevens. Erickson stated that the men would have to go into the paint shop and wash paint buckets, a task which had previously been performed by members of a Hod Carriers' local, not affiliated with the Alliance. Prior to the strike, members of Cuccia's local, had not been admitted to the paint shop. Erickson stated furthermore, that his orders were that unless members of Local 727 worked in the paint shop their employment would be terminated. Whereupon the employees voted not to work in the paint shop. Following this event, Cuccia returned to his regular work.

On the morning of April 3, Cuccia's pusher ordered him to report to Dave Vail, the special effects boss, "to go painting." Cuccia refused stating that he would report to the office instead.

Cuccia testified that on reporting, Stevens gave him an availability slip and a time card, and told him to punch out. However, the availability slip that Cuccia presented at the hearing was dated July 13, 1943, and it is the undersigned's opinion that Cuccia's recollection of this incident is not correct. Rather, the undersigned is of the opinion, and finds, based upon Steven's testimony, that upon reporting to Stevens, Cuccia was told to report to his local. Stevens testified that he had been instructed to send laborers to their local "if they didn't work for Mr.

Vail," presumably for their refusal either to paint or to wash paint pots. Cuccia testified that he refused to go into the paint shop because of his physical defects (sinus trouble) and for the further reason, that he could not see himself "being used as a strike breaker."

On the afternoon of April 3, Cuccia asked Erickson to help him get his job back. Erickson called the studio, but was unsuccessful in securing Cuccia's reinstatement. On April 5, Cuccia returned to the studio for his check and asked for an availability slip stating the reasons for his "discharge." He was issued a Statement of Availability which gave no reason for his separation. A. I. Chancey, respondent Columbia's head timekeeper, testified that when Cuccia saw him on April 5, Cuccia stated that he wanted an availability slip because he was going to work in a war plant and that it was the practice to issue a Statement of Availability when an employee requested one for the purpose of leaving the motion picture industry. The undersigned concludes and finds that Cuccia was not discharged as alleged, but rather that he voluntarily absented himself on and after April 3, because of his decision not to fill the job of a striker.

In either November or December, 1945, Cuccia asked Stevens for his job but was told that the matter was out of his hands and that he did not know what he could do for Cuccia. Again in June 1946, Cuccia asked Stevens for a job and received substantially the same response. During the strike, and

up to about February, 1946, Cuccia was in the trucking business. Following the latter date, he did not attempt to secure work other than at respondent Columbia.

5. Respondent Columbia—Case No. 21-C-2562.

The amended consolidated complaint alleges that respondent Columbia discharged Irwin P. Hentschel on or about March 19, 1945, and thereafter failed to reinstate him because he refused to perform the work and take the job of a striking employee. The respondents' answer is a general denial.

Hentschel, a prop maker, was first employed by respondent Columbia in 1937. On March 19, Hentschel was at work drilling rubber arrowheads in the prop shop. At about 1 p.m. Hentschel was instructed by his foreman, Geza Gasper, to attend a meeting in the carpenter shop. There Hentschel observed Supervisors Vail and Gasper and Brewer, DuVal and other Alliance representatives. Brewer instructed the members of Local 44, to do any work required of them by the studio. None of the studio officials spoke. Following the meeting Hentschel returned to his work.

Shortly thereafter, according to Hentschel's testimony, Gasper told him to drop the work that he was doing, fashioning rubber arrowheads, and go over and "paint those arrows, or else you will have to see Mr. Vail." Gasper testified that what he told Hentschel to do was to tone down the arrow shafts.

He denied that he instructed Hentschel to paint arrow shafts, although he admitted that he might have instructed Hentschel to "age" them. Gasper admitted, that when he instructed Hentschel to process the arrow shafts, Hentschel stated that this was painting and that Gasper told him that if he did not want to do the operation he should see Vail.³⁴ On this day, the painters were not at work at the studio.

Hentschel told Vail that he had been asked to paint and that under no circumstances would he take the job of a man on strike because it was against his principles.³⁵ Hentschel told Vail that he had been hired as a prop maker and that prop making did not include the task of painting. Hentschel asked if he was to understand that if he refused to paint his services would no longer be required and Vail answered affirmatively. Hentschel asked for an availability slip but Vail said that he would have to obtain it from the time office.

At the time office, Hentschel was told that Vail had his availability slip. Hentschel then when to Lacey, the personnel manager, and asked why he had been "discharged." Lacey replied that his hands were tied. Lacey told Hentschel that he could have an "extended availability slip" but Hentschel

³⁴Regardless of whether the process was one of painting or aging, it is clear from Gasper's other testimony that there had never been a previous occasion in his department to do work of this nature, it having been done elsewhere.

³⁵Hentschel was shop steward of Local 44.

demanded an availability slip that would permit him to work out of the motion picture industry. Chancey testified that Lacey instructed him that there was no reason to issue an availability slip to Hentschel because he had not been discharged. According to Chancey's further testimony when an employee was discharged, a close-out slip was made which was not done in Hentschel's case. The undersigned concludes and finds that Hentschel was not in fact discharged but rather refused to perform the work of painters and for this reason left his job.

On the morning of October 31, 1945, Gasper asked Hentschel to return to work the next day on the afternoon shift. Hentschel told Vail in a later telephone conversation that it was his intention to report October 31, at 1 o'clock, to talk to Vail before resuming work, so that an understanding could be reached as to the hours of his employment and respondent Columbia's attitude toward him as an employee. That afternoon Gasper assigned him to work. At the end of his shift, Hentschel was told that there was no more work and that he would be on call thereafter. Gasper testified that he was not responsible for Hentschel's failure to continue working after October 31, and he knew of no reason why Hentschel could not work as a prop maker after that date. He acknowledged also that union members with less seniority than Hentschel were continued in employment after October 31. It seems clear that Hentschel's dismissal was due to respondent Columbia's enforcement of Pelton's orders.

Hentschel was employed in the industry from September, 1945, to June, 1946, when his employment was terminated because of his expulsion from the Alliance.

6. Respondent Republic—Case No. 21-C-2563.

The amended consolidated complaint alleges that respondent Republic discharged Robert W. Ames on or about March 29, 1945, and refused to reinstate him thereafter for the reason that Ames refused to take the job of a striking employee. Respondents' answer denies the discharge; admits that on October 31, Ames was refused employment, and advised that all calls for employment in the prop department were being placed with Local 44 of the Alliance; and that respondent Republic would employ Ames should be sent by the local.

Ames was first employed by respondent Republic about January, 1945. He is a wood carver and was employed in the prop shop making props and build-miniatures. Ames has been a member of Local 44 of the Alliance since 1937.

About March 15, 1945, Ames refused to assist in the construction of a set, selling his foreman Dwight Holson that this was carpenter's work. A few days later, Ames again refused to do carpentry work, contending that it was not within the jurisdiction of his craft. Ames stated that he objected "to doing scab work, that it was work for which I was not employed, that I was a prop maker, and I insisted on remaining a prop maker."

About March 20, Howard A. McDonell, respondent Republic's business manager, told Ames that he understood that Ames did not wish to cooperate with respondent Republic. Ames replied that if McDonell meant that he had refused to act as a strike breaker it was true, because it was against his principles. McDonell urged Ames to get in line and do the work that he had been asked to do, but Ames reiterated his refusal to perform carpenter's work. About March 28, Ames again refused to do some carpentry work. On March 29³⁶ Holson told Ames that he was laid off; the studio was closing for a few days; but he was not fired.

Ames acknowledged that he was never told that he was discharged and that no threats of discharge were made to him because of his refusal to do carpentry work. He testified however, that in his conversation with McDonell, it was indicated clearly that he would be discharged because of his continued refusal to perform carpentry work.³⁷ Ames' lay off occurred not more than 1 day after the conversation with McDonell and at the same time, 9 other men were laid off, some of whom, unlike Ames, had performed carpentry work.

Jack Baker, respondent Republic's production manager, testified that about March 15, respondent

³⁶This date was fixed by Ames.

³⁷Ames testified as follows concerning this conversation with McDonell: "The substance of it was, 'Do as we say, or you will be fired.' Now, that is as clear as I can make it.

Republic determined to curtail its production. In accordance with its determination, Baker conferred with Ted Lydecker, head of the prop department, and Kenneth S. Svedeen, the latter, in charge of special effects and miniatures, in the prop shop. These two supervisors were instructed by Baker, about March 21, to cut prop makers from a force of 21 to about 11. According to Svedeen, he and Lydecker selected the individuals to lay off. Svedeen testified that no one was discharged or laid off because of his refusal to do carpentry work, that in this respect, the men's feelings were respected. He testified, however, that Ames was laid off because he would not perform his work as a prop maker and that he spent about half his time gathering up small crowds of employees and talking to them. It seems clear from Svedeen's testimony that prop makers who did obey respondent Republic's instructions to cross jurisdictional lines were laid off either before or on the day that Ames was laid off, and that some prop makers who refused to do carpentry work were not laid off.

The purport of Svedeen's testimony was, that Ames was laid off for lack of work and because he was the ringleader in starting discussions among the prop makers, who respected his opposition to crossing jurisdictional lines. Svedeen acknowledged that he never cautioned Ames but he did complain to Holson about the matter. Svedeen admitted also, that other individuals stood around talking, but he contended that no one was as prominent as Ames

in this respect. When Ames was laid off, these discussion groups had quieted down and according to Svedeen, Ames was performing his work satisfactorily.

In the lay off and in the later rehire of prop makers, respondent Republic made no effort to comply with the seniority clauses of the Local 44 contract, which provides generally that junior members of the Union shall be laid off before senior members in a job classification.³⁸ When Ames was laid off, junior members were retained. There is no showing however, that Ames possessed the qualifications of the prop makers retained.

The undersigned is satisfied from an examination of the record that respondent Republic curtailed its production in March, 1945, and that Ames, as well as other prop makers, who had refused to perform carpentry work were laid off in accordance with the new production schedule. Prop makers, however, who refused to perform carpentry work, were not laid off and respondent Republic followed no

³⁸The seniority section provides in part as follows:

B. The Producer shall have freedom of selection within the Senior Group for hiring, filling vacancies and making promotions, and shall not be required to lay off Senior members on any fixed basis.

C. Junior members in any job classification shall be laid off in all cases before any Senior members in such job classification are laid off. Upon request from the Union, a Junior member shall be replaced by a Senior member within a job classification, but no Junior member need be laid off until he has completed his current assignment.

set seniority pattern in determining who or who should not be retained. It also appears that respondent Republic hired two prop makers during the course of the strike, but it is not clear that Ames was qualified to perform the work of the prop makers thus hired. The undersigned is not persuaded in view of all the facts set forth above that Ames' refusal to perform carpentry work was the motivating cause for his lay off.

On a day following the end of the strike, Ames spoke to McDonell and told him that he wanted to come back to work. McDonell replied that Ames' "case" was different. He asked Ames if he had been on strike and Ames said, "No, but since I was laid off I have respected picket lines." McDonell told Ames he would check on his "case." That afternoon McDonell again asked Ames if he had been on strike. Ames replied, as he had previously stated in the morning, that he had been respecting picket lines since his lay off for refusal to do carpentry work. McDonell then said that he had been laid off because he was not a good prop maker. This was the first warning that Ames received that he was not an efficient workman. About January, 1946, some months after Ames had filed charges under the Act, he received a message from the Regional Office to call McDonell. Upon doing so McDonell advised Ames that respondent Republic would be glad to reinstate him; that the strike had been difficult for all; and that as soon as Ames informed McDonell when he wished to return McDonell would arrange

it. Ames replied that as soon as he was free to return, he would call McDonell. Following this conversation Ames never communicated with respondent Republic to notify it when he would be available to return to work. Thus, it appears that since January, 1946, Ames has not availed himself of the opportunity to return to work at the studio.

It seems clear that respondent Republic's failure to rehire Ames about October 31, was due to the fact that it was complying with Pelton's instructions of October 31, not to rehire any Alliance member who had refused to cross the picket line during the strike and that failure to rehire him from that time up to sometime in January, 1946, is attributable to those instructions. The undersigned so finds.

Ames was expelled from Local 44 of the Alliance on June 14, 1946, and respondent Republic was served with notice thereof.

7. Respondent Loew—Case No. 21-C-2662.

The amended consolidated complaint alleges that respondent Loew discharged George I. Groth on or about March 23, 1945, and refused to reinstate him to his former position and discharged John L. Selgrath on or about March 24, 1945, and refused to reinstate him until December 19, 1945, and that the discharges and refusals to reinstate were due to the fact that the said employees refused to perform the work and take the jobs of striking employees. The answer denies any discrimination, but admits that about November 14, 1945, Selgrath made application

for reemployment which was refused, because of the fact that respondent Loew was advised by Local 80 of the Alliance, that Selgrath was not in good standing in the Union, and that upon being further advised about December 19, that Selgrath was now in good standing, he was offered employment.

George I. Groth first started to work for respondent Loew in January, 1942, as a member of the labor gang. Groth is a member of Local 727 of the Alliance.

On the morning of March 22, Groth was asked to fill holes and cracks with putty using a broad knife. Groth worked with his fingers, instead of using the knife; continued on his job for about 30 minutes; and then slipped out to the card rack to observe his time card. He noticed that his rate had been changed from that of a laborer to that of a painter.

On March 23, Groth reported to work at his accustomed place and was then sent to the leather room where, along with others he was handed a paint brush and painters' tools by a pusher. Groth told the pusher that he would not paint, and was sent to Herb Schuetze, the gang boss. On reporting to Schuetze, Groth was asked if he wanted to work and he replied, "Yes, but I don't want to paint." Groth accompanied by three or four other employees who had also refused to paint, started to leave the lot and upon reaching the gate were sent to the office of Fred Gabourie, superintendent of construction. There, Groth was told if he would not paint, he would not be paid. Thereupon Groth left the studio.

Groth had never done any painting of any kind during the history of his employment, nor had he performed any painter's work such as filling holes or cracks with putty. Groth testified that he refused to do the work of painters because he had never done anything but labor work in the studio and "painting is highly technical. I do not know the first thing about it. Besides it was someone else's work. I did not wish to do it." Groth admitted that he gave no reason to his supervisor for his refusals to paint, he just told them that he would not do it.

Groth returned to the studio on April 2, because, he testified, "I just wanted to go back to work." He reported to the scene dock where the laborers met and then he was sent to a stage by Schuetze. Paint brushes and painters' tools were again passed out but Groth refused to accept them. On his refusal, he was ordered to take his time card to Schuetze's office. Schuetze asked Groth if he wanted to work and Groth replied that he did but he did not wish to paint. Schuetze told Groth that he knew the "set up" and Groth left the lot.

Early in April, 1945, when Groth paid his union dues he told Orville Brown, financial secretary of the local, that he was willing and anxious to take a labor call. Brown, however, stated that things were in bad shape and that he could not give Groth "a straight labor call." In the latter part of October, Groth again repeated that he was eager to return to work for respondent Loew or get a job elsewhere and Brown informed him that he would do what he

could. Groth called the studio on November 3, 1945, and Schuetze asked him where he had been. Groth answered that he had been off. Schuetze stated: "As far as I am concerned, you are still off," and hung up. Groth started to work for the Hal Roach Studios on March 9, 1946, and since that date no longer desired reinstatement with respondent Loew.

John L. Selgrath has been employed by respondent Loew for about 20 years. Selgrath has been a key grip since 1933, and in March, 1945, was a member of Local 80. As a key grip, Selgrath was assigned to a camera man and on production, among other duties, supervised the moving of walls and the setting up and use of reflectors.

On March 23, 1945, Selgrath worked at his usual tasks as key grip and on the 24th his superior, Andy McDonald, the grip foreman, assigned him to do some carpentry work. Upon his refusal, Selgrath was instructed to report to William Barrett, business representative of Local 80. Selgrath told Barrett that he would not do carpentry work, whereupon Barrett called McDonald and told him to discharge Selgrath. Selgrath returned immediately to the studio and saw McDonald, who stated that he had no right to fire Selgrath and he did not know what to do. Selgrath then asked McDonald if arrangements could be made for him to see William R. Walsh, respondent Loew's labor relations director.³⁹

³⁹Not to be confused with Richard F. Walsh, International President of the Alliance.

Selgrath saw Walsh on Monday, March 26. During a lengthy conversation, Selgrath asked Walsh what was going to be done with him. Walsh replied that he did not know. He would not discharge Selgrath nor would he lay him off. Selgrath then agreed to go home until the strike was over. Selgrath told Walsh that he would be willing to cross the picket lines to do his own work but he would not perform carpentry work.

Following Selgrath's conversation with Walsh, he saw Jerry Mayer, the studio manager. Present on this occasion in addition to Mayer and Selgrath, were Gabourie, superintendent of construction, Walsh and Hopper, assistant to General Manager Mannix. Mayer took the lead in the conversation and urged Selgrath and Employee Scoggins, who accompanied Selgrath, to return to work. Selgrath told Mayer that the issues precipitated by the strike should be settled by the union leaders and that his experiences during the strike of 1933, were such that he could not take the job of an employee who was out on strike.⁴⁰

Following the meeting with Mayer, Hopper told

⁴⁰Selgrath testified: "I told him that in 1933, when I was working in the carpenter shop that this same thing had come up again, told him how that previous to that time how they came to the studio, if we didn't take a job as a grip or stand-by carpenter that we were fired, so I took that job, and told him about my daughter coming home one day from school and telling me that she couldn't play with the other kids because her dad was a scab. So that ended that."

Selgrath that General Manager Mannix wanted to see him. At this meeting, Mannix told Selgrath that he did not like to see him leave and tried to persuade Selgrath to help out by doing part time carpentry work and continue with his regular job. In addition, Mannix told Selgrath that the Carpenters Union was trying to take work away from the Alliance; that the Alliance was going to try to keep the studios open; and he suggested that Selgrath "stick" with his union and do whatever work was asked of him. Mannix was asked if Selgrath would be discharged for refusing to do carpentry work and Mannix replied that he did not think so. Selgrath asked if he could return to his regular work and Mannix answered that he do so by spending part of his time in the carpenter shop.⁴¹

Selgrath sought reinstatement on October 31, and saw McDonald who told him that he would consult Gabourie. McDonald later instructed Selgrath to return the next morning and that he would be re-employed as a key grip. When Selgrath came to work the next morning, he found his time card missing, and he was ordered to report to Gabourie, who in turn told him to report to his union. At the union offices, Barrett stated that there was nothing he could do for Selgrath.

On November 14, Selgrath wrote Walsh, in part, as follows:

⁴¹In July and October 1945, Selgrath was offered his job provided he would work from 30 minutes to 2 days in the mill as a carpenter. Selgrath refused to accept employment under those conditions.

I now request reinstatement to my job without discrimination. I would appreciate an immediate reply advising me when I should report for work or the reasons for the demise of my request.

In reply, Walsh answered, on November 26, in part:

Please be advised that we operate the Grip Department by virtue of a closed-shop agreement with Local No. 80, I. A. T. S. E., and employ only members in good standing with that organization. At present your organization has advised us you are not in good standing with it. In the event your union advises us that you are in good standing, we will consider you for employment.⁴²

Sometime after this, Local 80 instructed Selgrath to report for work on December 19, 1945. On reporting, Gabourie told Selgrath that there were no vacancies for key grips and that he would be hired as a new man at the rate of \$1.63 an hour instead of the rate of \$2.05 an hour for key grips. Although Gabourie had informed Selgrath that he was being rehired on December 19, as a new man, he was given his old clock number and deduction authorizations for various purposes which Selgrath had previously executed were continued in force and operation after his return. At the time of the hearing Selgrath was still employed as a grip. He testified that key grips were on a weekly salary of \$139.50 for about a 60-hour week.

⁴²Selgrath testified that he was always a member of Local 80 and that he was never advised by the union that he was not in good standing.

It appears clear from the facts found above, that Selgrath was neither discharged nor laid off and was offered every inducement to continue his work as a key company grip provided that he would spend part of his regular hours of employment doing carpentry work. This Selgrath refused to do, voluntarily abstaining from his job, because of personal convictions that he could not perform any part of the work of employees out on strike or supporting the strike. The undersigned so finds. The discrimination, if any, with respect to Selgrath, in the undersigned's opinion therefore, rests on respondent Loew's action taken on and after October 31, when Selgrath sought reinstatement as a key company grip. In this connection Walsh testified that either on October 31, or November 1, Barrett telephoned and told him that Selgrath had not worked during the strike and was not to be returned to work because he was no longer in good standing in Local 80.⁴³ In addition, Walsh received a copy of Pelton's instructions to members of the Association. He testified that those instructions applied equally to both Selgrath and Groth. About December 19, Walsh was advised by Local 80 that Selgrath had been cleared for rehire. It was pursuant to this advice that Selgrath was then reemployed as a grip on December 19, 1945.

⁴³At this time Selgrath's job had been taken by his assistant Carl Reed, who resigned in March 1946. The job has not been filled, there being no need, according to Walsh, to fill the post.

8. Respondent Twentieth Century—Case No. 21-C-2664.

The amended consolidated complaint alleges that respondent Twentieth Century refused to reinstate Eugene V. H. Mailes to his former position of greensman, between October 31, 1945, and February 18, 1946, because Mailes refused to pass the picket lines during the strike. Respondent Twentieth Century answers this by general denial and avers further that on June 14, 1946, it was notified that Mailes had been expelled from membership in Local 44 of the Alliance; that respondent Twentieth Century had entered into a closed-shop contract with Local 44 covering Mailes' classification, and pursuant thereto, only workers who are members in good standing of the Alliance could be hired.

Mailes has been employed by respondent Twentieth Century for about 2½ years as a greensman. Mailes joined Local 44 in 1939. He was expelled from the Union on June 14, 1946.

Mailes worked at his regular job during the entire course of the strike and up to October 1, 1945. During that time Mailes performed certain work over which no clear jurisdictional lines had been established. However, he was never asked to perform any work over which the Carpenters' jurisdiction had been clearly established. On October 1, 1945, Mailes went on his regular vacation. An employee's vacation notice introduced in evidence shows that Mailes' vacation with pay was approved for a pay period of 12 days from October 1 to October 13,

1945. Mailes did not return to the studio on Monday, October 15, the day he was scheduled to return from his vacation. Instead he called the studio and spoke to Fred Lutz, assistant chief of his department, on the morning shift.

Mailes testified that when he spoke to Lutz on October 15, he asked for an extension of his vacation, on the ground that he believed that he might be helpful in settling the strike and that Lutz stated that he would hold up his vacation slip until he was informed to the contrary. Whether in doing so Lutz exceeded his authority, Mailes was unable to state. He testified that he assumed that Lutz as a responsible assistant department chief, had such authority. Lutz testified, however, that he could recall no specific conversation with Mailes about exceeding his vacation. He testified moreover, that he had no authority to do so. He admitted that he had held a number of conversations with Mailes but he could not distinguish one talk from another. Lutz was not a persuasive witness. His testimony was general in nature and at times contradictory. The undersigned is satisfied that on or about October 15, Mailes did telephone to Lutz and asked for a vacation extension. There seems no doubt concerning Lutz's general supervisory authority. In his capacity as a supervisor, he spent most of his time in the office and gave instructions to foremen. The undersigned finds therefore, that Mailes did ask for an extension of his vacation and that he had reasonable grounds for belief, as the result of his conversation with Lutz, that his vacation had been extended.

About October 18, Mailes spoke to Charles Hickson, assistant chief of the department, on the afternoon shift, and told him that because of increased violence he preferred to remain away from the studio. Hickson replied that this was satisfactory; Nick Kalten, the head of the greens department, understood the situation and did not want any of his employees to take chances.⁴⁴ These findings are based upon Mailes' undenied and credible testimony.⁴⁵

Following the announcement of the strike settlement about October 29, Mailes went to his union to pay his dues. Then he called Lutz and asked for permission to return to work on his regular shift. Although Lutz could not recall anything about the request from Mailes to return to work, he did acknowledge that Mailes telephoned him seeking reinstatement and that he instructed Mailes to contact his local, because the union had advised the studio that Mailes "had lost his card, or wasn't in favor with the union, or something." Secretary Hill told Mailes that Brewer was not satisfied with the way Mailes had spent his time since October 1. Then Mailes went to the studio and spoke to Kalten. Mailes asked Kalten if he could return to work but Kalten was noncommittal stating that he would

⁴⁴There had been no violence on the picket line around respondent Twentieth Century's studio during the month of September, and Mailes knew of no violence during the month of October. It does appear that there was violence elsewhere about this time.

⁴⁵Neither Hickson nor Kalten testified.

have to check with Meyer, the personnel manager, and further that Mailes was the only individual who had caused his department any difficulty.

On November 12, 1945, Mailes saw Meyer at the studio. Meyer stated that the studio was willing to reinstate him if the union had no objection. Mailes replied that all he knew was that he could not work. Meyer then stated that according to his information, based upon pay roll department records, Mailes had quit his job. Mailes replied that he had gone on vacation; that his vacation had been extended by Lutz; that thereafter Hickson had given further permission to stay out; and subsequently, Mailes had gone to the union, paid his dues, sought reinstatement through Kalten and had been unsuccessful up to date.

Respondent Twentieth Century introduced in evidence a record entitled "Daily Report Of Changes In Personnel," dated October 13, 1945, which purported to show that, effective as of that date, Mailes had been marked off the pay roll. How this document could be dated October 13, when Mailes was not due to return from his vacation until October 15, is not clearly explained. Lutz testified that a close-out sheet would not be made out in the case of an employee whose vacation had been extended. Lutz had nothing to do with the preparation of the document and he could not remember talking to Kalten about it. Lutz also acknowledged that despite a close-out, a regular employee such as Mailes would be rehired if there was work to do. Finally, Lutz testified that

the close-out sheet was made, in the case of Mailes, because he failed to return to work within 6 days after his vacation ended. This still does not explain the effective date of October 13. The undersigned is not convinced that this document is entitled to serious consideration. The effective date renders it suspicious, as well as the fact that Lutz's testimony concerning it was not specific, and Kalten was not produced as a witness to testify concerning its preparation or his signature on the document. The undersigned finds, therefore, that the document can be accorded no weight to support the respondent's theory that Mailes voluntarily quit his employment.

In the latter part of January 1946, Mailes was informed that the way had been cleared for him to return to the studio. Mailes went to the studio and saw Lutz, telling him that he now understood that he could return to work. Lutz, however, stated that there had been no change in his status. Thereupon, Mailes called Meyer and explained to him what he had been told. Meyer explained that he had no objection to Mailes' employment but that all hiring was done through the union and that if Mailes was sent to the studio by Local 44, Meyer would hire him. Sometime thereafter Mailes protested to Secretary Hill that he was not being recalled, whereas permit greensmen were at work in the studio. About the middle of February, 1946, Mailes was reemployed at his regular job on the afternoon shift in the landscape department. In this connection DuVal testified that Mailes was entitled to his job over any permit man employed in November, 1945, provided

Mailes was a member in good standing.⁴⁶ To DuVal's knowledge, Mailes was in good standing in the union at that time. He had not been suspended or expelled.

Mailes continued to work for respondent Twentieth Century until June 16, 1946, when the studio notified him of his expulsion from the union and he was laid off.

9. Respondent RKO—Case No. 21-C-2665.

The case of Forrest McLoney alleged to have been refused employment by respondent RKO from October 31 to December 27, 1945, was dismissed at the hearing on motion of counsel for the Board. It will be recommended hereafter that the complaint be dismissed in respect to respondent RKO.

D. Conclusions.

The foregoing covers in detail the employment history of each complainant after March 12, 1945. There is no single uniform pattern of conduct applicable to all. The various cases separate themselves into three main classifications with separate in-group distinctions: Those who were discharged outright for refusal to perform the work of a striker;⁴⁷ those who refused to perform assigned

⁴⁶Under Local 44's policy of policing its contracts, permit men were replaced by unemployed members of equal skill.

⁴⁷Batchelder, Bonning, DeSanctis, Gidlund, Hand, Jensen, Lamb, Lora, MacKellar, Rogers, Sapp, Simpson, Stoica and White.

work, some of whom were denied discharge slips or availability slips and either were sent to their unions or went home and were subsequently refused reinstatement;⁴⁸ and finally those who voluntarily absented themselves during the strike or refused to cross the picket lines and were thereafter denied reinstatement.⁴⁹

The rights of the complainants, if any, rest upon law applicable to these broad fact situations. At the outset however, there must be considered the strike of Painters Local 1421, which set in motion the chain of events culminating in this proceeding. On the final day of the hearing, respondents' counsel asked the undersigned and the Board to take judicial notice of a long series of administrative and procedural matters, commencing with the request for a strike vote filed by Local 1421 on December 6, 1944, under the provisions of the War Labor Disputes Act, including the respective unit contentions and dispute between Local 1421 and the Alliance over the right to represent set decorators, and ending with the representation hearing held from March 7 to 17, 1945, on the consolidated petitions of certain respondent Producers⁵⁰ and the unions⁵¹ involved.

⁴⁸Ames, Cuccia, Groth, Hentschel, Larson, Selgrath, and Seward.

⁴⁹Coffey, Goudie, Howe, Mailes and Stanley.

⁵⁰Case No. 21-RE-20.

⁵¹Case Nos. 21-R-2630, 21-R-2622, 21-R-2624, 2625, 2626, 2627, 2628, 2629 and 2630.

At the conclusion of the request to take judicial notice of the foregoing matters, counsel for the Board and for the individual complainants asked for an expression of the undersigned's intention. The undersigned stated that he had no authority to bind the Board to take judicial notice of the various matters, stating, however, that decisions of the Board and its opinions were controlling upon the undersigned. Counsel urged that the request was in effect an offer of evidence to take judicial notice of certain facts and that the materiality of the facts was as much in issue as if the same facts had been presented through an offer of proof. It was further urged that in the absence of a ruling counsel would then consider the request covered material matters and an opportunity was therefore desired to introduce further evidence on the same subjects, which would require presentation of a number of witnesses and the preparation of documents.

Counsel objected to a consideration of the matters for the reason, not that they were matters of which the Board could not take judicial notice, but on the ground that they were incompetent, irrelevant, and immaterial to any issue in this proceeding. Respondents' counsel urged that these were matters of which the Board must take judicial knowledge and that there was nothing for the undersigned to rule upon. In view of these objections, the undersigned ruled for the purpose of this proceeding, that he would treat the request as an offer of proof and that had it been made as an offer it would have

been rejected for immateriality. Because of this opinion that the matters referred to are immaterial, the undersigned has not taken judicial notice of those matters. The undersigned, however, does recognize and has taken judicial notice of and referred to the opinion of the Board in *Matter of Columbia Pictures, et al.*⁵²

The ultimate question herein presented for consideration and resolution, is whether the Act and applicable law as found by the Board and sustained by the courts, give employees the right by concerted action to refuse to take the jobs of striking employees or perform work vacated by striking employees, or those who although not striking, by absenting themselves from work, support the strike.

Subsidiary to the main question above, is the other, whether the complainants herein, by their action, in withholding services for all reasons assigned, did thereby engage in a "partial strike" of a nature which warrants protection of the Board, in the absence of any unfair labor practice on the part of the employers. First there is to be considered, those cases wherein the concerted activity was followed by discharge and the other group of cases wherein the discrimination, if any, following a voluntary abstention from work, was in the refusal to reinstate. There also arises the question of whether the conduct was unlawful, because taken to support a strike, called by another union, of which the complainants

⁵²64 N.L.R.B. 490, 17 L.R.R. 290 (1945).

were not members, during the course of a representation hearing.

1. The Discharge Cases.

There is no showing here that the action of the complainants was in violation of contract or otherwise violative of Board policy, and there is, in the undersigned's opinion, no element of unlawfulness which presents itself for consideration. Section 7 of the Act, expressly guarantees employees the right to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection. By Section 2 (9) of the Act, the term "labor dispute" includes any controversy concerning terms, tenure, or conditions of employment. By Section 2 (3), an employee who ceases work because of, or in connection with a current labor dispute retains his employment status by virtue of Section 2 (3) and (9) and the complainants were thereby entitled to the protection of the Act.⁵³

In *Carter Carburetor Corporation v. N.L.R.B.*⁵⁴ the Circuit Court of Appeals stated:

Section 7 gives employees the right "to engage in concerted activities, or for the purpose of collective bargaining or other mutual aid or protection." This "mutual aid" and "concerted activities" include, we think, the right to join other workers in quitting work in protest over the treatment of a co-employee,

⁵³*N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333; *N.L.R.B. v. American Manufacturing Company*, 106 F. 2d. 61 (C.C.A. 2).

⁵⁴140 F. 2d. 714 (C.C.A. 8).

or supporting him in any other grievance connected with his work or his employer's conduct.⁵⁵

Applying the above principles to facts found above, it is clear that 14 prop makers, members of Local 44,⁵⁶ all employees of respondent Warner, were because of their concerted protests against their employer's direction to have them work as strike breakers discharged on March 19, 1945. The jobs they were asked to fill were those of strikers and their refusal to take them was due to the fact that compliance would have placed them in the position of helping to break a strike.⁵⁷ Their refusal, accord-

⁵⁵Citing *N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d. 503 (C.C.A. 2); *Firth Carpet Co. v. N.L.R.B.*, 129 F. 2d. 633 (C.C.A. 2); *N.L.R.B. v. Good Coal Co.*, 110 F. 2d. 501 (C.C.A. 6); *Rapid Roller Co. v. N.L.R.B.*, 126 F. 2d. 452 (C.C.A. 7).

⁵⁶Batchelder, Bonning, DeSanctis, Gidlund, Hand, Jensen, Lamb, Lora, MacKellar, Rogers, Sapp, Simpson, Stoica and White.

⁵⁷"Certainly nothing elsewhere in the Act limits the scope of the language to 'activities' designed to benefit other 'employees'; and its rationale forbids such a limitation. When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts. So, too, of those engaging

ingly, constituted concerted activity protected by the Act and their discharge insofar as they were motivated by such refusals were discriminatory.⁵⁸

Before passing to a consideration of the other cases attention is focused upon another line of cases cited by respondents and Intervenor Alliance, under authority of which if applicable, a discharge for concerted activity and a refusal to reinstate which thereafter follows, would be held nondiscriminatory, because the concerted protest or activity was in support of an "unlawful strike," violative of Board policy. In principal support thereof, is cited the line of cases starting with and following the Board's decision in the American News case.⁵⁹

The Board laid down the principle in *American News*, that strikers whose objective was to induce the employer to give them a wage increase, without prior approval from the War Labor Board, as required by Executive Order under the Stabilization Act, were not engaged in "concerted activity" of

in a 'sympathetic strike,' or secondary boycott; the immediate quarrel does not concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased." *N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co., Inc.*, 130 F. 2d. 503, 505, 506 (C.C.A. 2).

⁵⁸*N. L. R. B. v. J. G. Boswell Company, et al.* 136 F. 2d. 585 (C.C.A. 9); *United Biscuit Co. v. N.L.R.B.* 128 F. 2d. 771 (C.C.A. 7); *Rapid Roller Co. v. N.L.R.B.*, 126 F. 2d. 452 (C.C.A. 7).

⁵⁹*Matter of The American News Co., Inc.*, 55 N. L. R.B. 1302.

the kind protected by Section 7 of the Act. Accordingly, the employer's treatment of the strikers' action, the termination of their employment, and his refusal to reinstate all men were held not to constitute an unfair labor practice. The serious impropriety in the labor conduct there involved was clearly plain, since the employer's compliance with the strikers' objective would have subjected him to criminal penalties under Wage Stabilization legislation.

Whether the "illegal objectives" test should be applied here in the instant proceeding requires reference to the Columbia Pictures case⁶⁰ and the Board's opinion therein. There the Board had before it the strike precipitated by Local 1421 on March 12, 1945, and which thereafter, during its course, gave rise to the actions of the complainants herein. Respondent's theory in short is, since the strike of Local 1421 was called for an improper objective, applying the "illegal objective" test of American News, the action taken by employees, who were not members of Local 1421, in support of an improper objective, places these latter employees in no better or different position than those who were members of Local 1421, and since the discharge of Local 1421 members would have been justified, similar action against nonmembers for supporting the unlawful strike is likewise privileged.

The theory thus advanced is rejected for two reasons. The Board in Columbia Pictures did not

⁶⁰Matter of Columbia Pictures Corporation, et al., 64 N.L.R.B. 490.

pass on the alleged illegality of the strike, holding:

We find it unnecessary to decide whether or not it would have been an unfair labor practice had the Producers granted recognition, the object sought by the Painters; assuming arguendo that such was the case, we nevertheless are of the opinion that the doctrine of the *American News* case is not applicable to the instant situation.⁶¹

The Board went on to distinguish the *American News* case pointing out that the strike therein prosecuted to compel an employer to violate the Wage Stabilization statute, was the kind of an action to which the Act should be accommodated if this could reasonably be done. In pointing this out, the Board stated that it regarded:

The decision in the *American News* case as one of narrow application, intended to apply primarily to a situation in which employees deliberately and knowingly strike to compel an employer to violate a statute which, when read in the setting in which it was enacted, manifested the inexorable intention of the Congress that its mandate be obeyed.⁶²

That was not the situation in the *Columbia Pictures* case, the Board said. It was further pointed out that the Board was satisfied that the Painters had struck to secure an objective which that union and its members believed themselves entitled to under the Act. They were entirely unaware that

⁶¹64 N.L.R.B. 490, 511.

⁶²*Id.* at 512.

recognition by the Producers at that moment might have constituted an unfair labor practice. The Board stated that a strike called during the Board's hearing and investigation to resolve the question at issue in the strike showed a disregard for the orderly processes of the Board, but it found nothing in the Act, and its legislative history, or in court decisions thereunder, which pointed to the conclusion "that the strikers' conduct . . . removed them from the ambit of the Act. On the contrary, the language of the Act and the decisions of the Board and the courts make plain that a strike of this character—to obtain recognition and collective bargaining—is within the 'concerted activities' contemplated therein and cannot render strikers vulnerable to loss of their status as 'employees' because this is their purpose.'"⁶³

Thus it is clear that the Board has not passed upon the legality of the strikers' conduct in the Columbia Pictures case, and in fact held moreover, that the strike therein was a concerted activity.

⁶³Id. at 514. In the Peter Cailler decision cited *supra*, the court at p. 506 said: "But so long as the activity' is not unlawful, we can see no justification for making it the occasion for a discharge . . ." In five other decisions, the Board has found occasion to discuss the American News doctrine and has deemed that doctrine inapplicable in all cases. See *Fairmont Creamery Co.*, 64 N.L.R.B. 824 (1945); *Rockwood Stove Works*, 63 N.L.R.B. 1297 (1945); *Republic Steel Corp.*, 62 N.L.R.B. 1008 (1945); *Indiana Desk Co.*, 58 N.L.R.B. 48 (1944); *S. & S. Cone Corp.*, 57 N.L.R.B. 260 (1944).

This being so, the undersigned cannot accept the premise that the strikers' conduct therein was illegal and that the complainants' action herein was any the less legal. Certainly, the complainants who did not strike and were not members of the striking unions should not be placed in a more hazardous position than the strikers, whose activity has been protected. For these reasons also, cases such as the Phelps Dodge Copper case are not deemed apposite to the situation here presented.⁶⁴

The second reason for rejecting the doctrine of American News as applicable here, is that there can be no justifiable finding that the complainants "deliberately and knowingly" struck to compel an employer to violate either Board policy or statute. They exercised their protest against doing strikers' jobs, a concerted activity, as heretofore found. Their concerted protest was not to force the respondent Producers to accomplish an illegal purpose but rather to permit continuance of fixed and determined patterns of work and conditions of employment. In this aspect of the case they are not on the same or equal footing as the primary

⁶⁴63 N.L.R.B. 686, 687. Where the Board held: "We are of the opinion that if, during the pendency of an election directed by the Board to resolve a question concerning representation, an employer extends or renews an existing contract with a labor organization, or makes a new one, he violates the Act insofar as that organization is accorded recognition as exclusive bargaining representative or employees are required to become or remain members thereof as a condition of employment."

strikers. The complainants were in fact willing to work during the strike. They asked only that they be permitted to continue their accustomed employment. This they had a legal right to do.⁶⁵ All the complainants herein stand on a different footing than the primary strikers and their rights rest upon established principles of law which protect the type of concerted activity in which they engaged.⁶⁶

2. Refusals to reinstate.

The legal rights of the complainants who were not discharged, but who on and after October 31, 1945, were refused reinstatement to their former jobs, rest upon other considerations now pertinent.

It will be recalled that on the afternoon of October 31, 1945, Pelton issued instructions to all the respondent Producers, that Alliance members who refused to come to work during the strike, were not to be returned to their regular jobs without approval of the Alliance. These instructions came

⁶⁵Matter of Firth Carpet Company, 33 N.L.R.B. 191; enforced *Firth Carpet Co. v. N.L.R.B.*, 129 F. 2d. 633 (C.C.A. 2).

⁶⁶It is clear that the complainants were not members of the striking union. Lack of membership in the union or ineligibility for membership is immaterial. Nonunion members may join sympathetically in the activity of a union in which they are not eligible for membership without relinquishing the protection afforded by the Act. See *Matter of Club Troika, Inc.*, 2 N.L.R.B. 90, 94; *N.L.R.B. v. Biles-Coleman Lumber Co.*, 98 F. 2d. 18 (C.C.A. 9).

from B. B. Kahane, chairman of the Producers Labor Committee. Pelton could not recall any discussion of this document or its contents with Alliance officials. Yet it seems incredible, that it could have been issued without prior consultation by some Producers' representative. There is abundant proof that all complainants were refused reinstatement on and after October 31, 1945, and in those instances where reinstatement had occurred, lay-offs followed, the instructions thus being completely obeyed. Later reinstatements as in the case of DeSanctis and Selgrath for example, were had only with Alliance approval.

This record contains no evidence that on October 31, any of the complainants had "bolted" from their locals; although it is true that by refusing to cross jurisdictional lines they had not complied with instructions of their International President.⁶⁷ Nor is there persuasive evidence that any

⁶⁷In *Matter of Washougal Woolen Mills*, 23 N.L.R.B. 1, certain employees joined a walk-out of other employees over a labor dispute. The Board held; "... these employees, by leaving the plant, did not intend thereby permanently to discontinue the normal employer-employee relationship, and that these employees were engaging in concerted action to secure a demand with respect to terms and conditions of employment. Whether or not this concerted action was authorized by the Union is, of course, immaterial in this connection. We find that the employees who participated in the walk-out remained employees within Section 2 (3) of the Act." The undersigned also believes it immaterial that certain employees asked for and obtained avail-

complainant was at this time expelled or under suspension from his local. So far as the record indicates they were all in good standing as Alliance members. In short, they were denied reinstatement to their regular jobs because the respondent Producers followed instructions emanating from their Labor Committee, fashioned to punish union members for daring to protest orders to cross jurisdictional lines. In the undersigned's opinion this is a clear case of refusal to reinstate for engaging in concerted activities protected by the Act and it is so found. As in the case of the discharged employees, those individuals who voluntarily absented themselves, or refused to perform assigned work and were sent home still remained employees for the purposes of the Act. The refusal to reinstate was due to the fact that each had engaged in withholding his labor, "a partial strike." A partial strike is a form of concerted activity that is protected under the Act.⁶⁸

ability slips. At that time they were needed to procure employment elsewhere, in the absence of which, the respondents could legitimately protest failure to look for and obtain work.

⁶⁸By virtue of Section 2 (3) and (9), the individuals here concerned remained employees after the date that their concerted activity commenced and were thereafter entitled to the protection of the Act. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333; *Rapid Roller Co. vs. N.L.R.B.*, 126 F. 2d. 452 (C.C.A. 73,; *Black Diamond S. S. Corp. v. N.L.R.B.*, 94 F. 2d. 875 (C.C.A. 2); *N.L.R.B. v. Good Coal Co.*, 110 F. 2d. 501 (C.C.A. 6). Moreover, whether or not they were employees of the respond-

Upon the entire record, the undersigned finds that respondent Warner discharged 14 prop makers on March 19, 1945, and that respondent Producers refused on or about October 31, 1945, to reinstate all of the complainants herein, because of their concerted activities, thereby discriminating in regard to the hire and tenure of employment of such employees and that the respondents thereby engaged in unfair labor practices within the meaning of Section 8(3) of the Act. It is found further that by such action, the respondents have interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act.

E. Interference, restraint and coercion

The amended consolidated complaint alleges that on or about March 19, 1945, respondents interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in the Act, by threatening employees that they would never work in the motion picture industry again, if they refused to perform the work or take the jobs of striking employees. In compliance with an order of the undersigned, counsel for the Board furnished an oral bill of particulars to respondents' counsel stating that foregoing allegation applied to a statement

ent Producers, a refusal to employ them for unlawful reasons would contravene Section 8 (1) and (3) of the Act. *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U. S. 177; *N.L.R.B. v. Waumbec Mills*, 114 F. 2d. 226 (C.C.A. 1).

made by Francis E. Fuhrmann, head of respondent Warner's prop department, on March 19, 1945.

Witnesses testifying on behalf of the Board,⁶⁹ testified that on the morning of March 19, 1945, Fuhrmann stated to the assembled prop makers, during the course of the meeting heretofore referred to, that in the event the prop makers refused to comply with his instructions to go into the carpenters' shop and perform the work of striking carpenters, for their refusal to do so, they would not be able to work in the motion picture industry again. Sapp and Lora testified that Fuhrmann used the word "eliminated." White and Batchelder testified that Fuhrmann stated that the prop makers would not be permitted to work in the industry again. Fuhrmann when questioned concerning this testimony acknowledged that he said that in the event they refused to do carpentry work they would be terminated "with the studio and would no longer work there." He denied that he had stated that they would no longer work "in the industry." The undersigned credits testimony of Board witnesses, substantially in accord as it was, and finds that Fuhrman made the statement attributed to him and that in effect he warned the employees that for their refusal to labor as carpenters they would not be permitted to work again in the motion picture industry. By the said statement, respondent Warner interfered with, restrained, and coerced its

⁶⁹Batchelder, Lora, Sapp and White.

employees in the exercise of the rights guaranteed in Section 7 of the Act.⁷⁰

It will be recommended hereafter that this allegation of the complaint be dismissed respecting the other respondents joined in the amended consolidated complaint.

F. Alleged interference, restraint and coercion

The amended consolidated complaint alleged further that the respondents engaged in interference, restraint and coercion by the payment of bonuses to those employees who passed the picket lines or performed the work of the strikers during the strike of March 12. This allegation raises for detailed consideration voluminous testimony concerning the circumstances under which the strike was settled and particularly the so-called, "Cincinnati Agreement."

While the strike was in progress, between October 15 and 24, 1945, the Executive Council of the American Federation of Labor met at Cincinnati, Ohio. There issued from the council meeting the following directive:

International Alliance of Theatrical Stage
Employees and Moving Picture Machine
Operators of the United States and Canada—

⁷⁰No evidence was adduced in support of the allegation that the respondents interrogated employees with respect to their union membership and affiliations. It will be recommended hereafter that this allegation of the amended consolidated complaint be dismissed with respect to all respondents.

Brotherhood of Painters, Decorators and Paperhangers of America—United Brotherhood of Carpenters and Joiners of America, Et Cetera.

Hollywood Studio Union Strike and Jurisdiction Controversy.

1. The Council directs that the Hollywood strike be terminated immediately.
2. That all employees return to work immediately.
3. That for a period of thirty days the International Unions affected make every attempt to settle the jurisdictional questions involved in the dispute.
4. That after the expiration of thirty days a committee of three members of the Executive Council of the American Federation of Labor shall investigate and determine within thirty days all jurisdictional questions still involved.
5. That all parties concerned, the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada; the United Brotherhood of Carpenters and Joiners of America; the International Association of Machinists; the United Association of Plumbers and Steam Fitters of the United States and Canada; the Brotherhood of Painters, Decorators and Paperhangers of America; the International Brotherhood of Electrical Work-

ers of America, and the Building Service Employees' International Union, accept as final and binding such decisions and determinations as the Executive Council committee of three may finally render.

The striking employees returned to work on October 31, 1945. Under the terms of the Cincinnati Directive the first 30 days thereafter were to be used by committees in Hollywood in an attempt to compose jurisdictional differences. Any differences then remaining unsettled, were to be adjusted during the following 30-day period by the three-man committee appointed by the Executive Council whose decision was to be final and binding on all the parties. Under the Cincinnati Directive "all employees" were to return to work immediately. There arose, however, after the issuance of the directive on or about October 25, the question whether those individuals who would eventually be replaced by the returning strikers, were to work in the studios along with them. Leaders of the Conference of Studio Unions demanded that the replaced individuals be taken off the lots. Walsh, president of the Alliance, however, contended that this was contrary to the directive.

In order to resolve this question, representatives of the parties convened in Washington to review the minutes of the Executive Council. The Producers were represented at Washington by Mannix, of respondent Loew, Eric Johnston, who was later to become president of the respondent Association,

and others. As a result of this trip to Washington a clarification was issued, to the effect, that the respondent Producers should use their judgment in determining whether the replaced workers, who were members of the Alliance, should or should not work during the ensuing 60-day period, side by side, with members of the Conference of Studio Unions who were returning to work. This clarification was issued in time to permit the return to work of the strikers on October 31, 1945.⁷¹

Under the clarification, it had been agreed that all men on call on March 12, 1945, the day the strike started, were to return to those jobs and all who might be displaced at the end of the 60-day period by the settling of jurisdictions were to be given other employment in the studios during that period. Instead of the replacements working during that 60-day period, about November 12, it was decided to pay off the replacements in a lump sum and they were not required to report thereafter, unless the Producers asked for them. This lump sum was based upon the classification rate on October 31, 1945, and was adjusted to the normal working time for the ensuing 60-day period. Some of the workers who received this lump sum award did, in fact, after receiving it take other jobs in the industry, and were of course paid for work performed on other jobs.

⁷¹During the strike, in addition to Alliance members who had crossed jurisdiction lines to take the jobs of strikers, Alliance locals had furnished employees to fill vacated jobs.

The original settlement had contemplated that "all employees" would work during the 60-day period, but because of the position taken by the Conference, that its members would not work with the replacements on or after October 31, rather than upset the settlement agreement, President Walsh of the Alliance agreed to the proposition that an additional award would be made to certain categories of workers. It had been agreed that pay for the 60-day period was to go only to those workers who were on the pay rolls as of October 31. However, those not on the pay roll as of that date, but who had previously worked for 15 days or more as replacements during the strike, were to receive another award, computed at the rate of \$3.50 a day for every day they had worked out of their jurisdiction during the strike. This award was agreed to at or about the time of the Cincinnati agreement and it would appear that no suggestion had been made at any time during the strike and up to October 25, 1945, that any person who had worked during the strike would receive any money other than the regular amount for work performed.

The \$3.50 award went to some workers who were totally displaced and to others who were not at work on October 31. Some of them had worked a few days, others during most of the period. No man who received the \$3.50 a day settlement received the 60-day award. In addition, those workers, who, for example, as prop makers had gone into the carpenter shop and performed the work of carpenters dur-

ing the strike, and who after October 31, returned to their original jobs as prop makers, did receive an award based upon \$3.50 a day for all days that they had worked outside of their jurisdiction. At respondent Warner, several hundred employees, under Fuhrmann's supervision, received the extra compensation of \$3.50 a day for every day those employees had gone outside their jurisdiction to work as carpenters. This award was made to them some time in March or April 1946, while they were regularly employed in their original jurisdictions. Fuhrmann testified that he never heard the \$3.50 a day award referred to as "severance pay" and understood, according to his testimony, that it was given as extra compensation to employees for working outside of their jurisdictions during the strike.

There is one additional payment which is not explained by any of the foregoing facts. Geza Gasper, foreman of the prop makers at respondent Columbia, testified that in the spring of 1946, he received a bonus check of some \$900, which represented his salary for a period of about 8 weeks. Gasper acknowledged that during the strike he acted at times as foreman in the carpenter shop.

The foregoing covers in substantial detail the matter of extra compensation paid pursuant to the Cincinnati Directive for work performed during the strike. In the undersigned's opinion not all the details and intricacies of the financial arrangements were fully disclosed and brought forth. Undoubtedly, there were certain applications of the Cincin-

nati Directive and payments made to many workers which did not fit precisely into the situations set forth above.

However, the question remains whether these facts sustain the allegation of the amended consolidated complaint that payment of the above awards to employees who passed the picket lines or performed the work of strikers, constituted interference, restraint and coercion on the part of the respondents. In the undersigned's opinion, crucial to a finding that the Board's complaint in this respect has been sustained, is some element of proof that workers were promised or told that for their conduct in passing through the picket lines or performing the work of strikers, they would receive in addition to their fixed compensation, an additional bonus and that the bonus became an inducement to the workers to help break the strike. Although such may have been the case either by rumor or assurance on the part of representatives of the Alliance and the respondents, there is no testimony in this record, that prior to October 25, 1945, any worker had been given to understand that he would for his conduct during the strike participate in the declaration of a bonus. Rather it appears affirmatively, that the first knowledge that such a bonus would be declared or granted became known on or after October 25, when the strike had been settled and under the terms of the Cincinnati agreement, arrangements had been made to return the strikers to their old jobs.

It appears clear that the Executive Council of the American Federation of Labor by reason of its directive, had ordered "all workers" to return pending a determination of the jurisdictional conflict and that during this period they would be paid for the time spent on the job. Presumably, the commitment to pay all workers, strikers, and non-strikers alike for the 60-day period was acceptable to all parties who had participated in the Cincinnati agreement. This payment under no circumstances, could be considered an inducement to any worker to cross picket lines or take the jobs of striking employees. It is not quite as clear in the application of the \$3.50 payment, given to those who worked 15 days or more during the course of the strike. But here again, this additional award was not held out as an inducement, at any time, to the individuals who received it, to induce them to cross picket lines.

It is true that because of these financial arrangements, those who worked during the strike or took the jobs of strikers fared better financially than the strikers or those who by their concerted protest refused to work. But there is in the undersigned's opinion, an absence of any element of proof nor can it by logical deduction be found that the financial payment interfered with, restrained or coerced the respondents' employees. It will be recommended hereafter that this allegation of the complaint be dismissed in respect to all respondents.

IV.

The effect of the unfair labor
practices upon commerce

The activities of the respondents set forth in Section III above, occurring in connection with the operations of the respondents described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to and have led to labor disputes burdening and obstructing commerce and the free flow of commerce.

V.

The remedy

Having found that the respondent Warner violated Section 8 (1), and that all the respondents violated Section 8 (3) of the Act, the undersigned will recommend that the respondents cease and desist therefrom and take certain affirmative action which the undersigned finds necessary to effectuate the policies of the Act.

It has been found that respondent Warner, on March 19, 1945, discharged 14 prop makers, members of Local 44 of the Alliance, because of their concerted protest against efforts of the respondent Warner to force them to perform the work of carpenters in the carpenter shop. Attempts of some of the individual prop makers, to return to work during the course of the strike, to perform the jobs held the day of discharge, were unsuccessful. More-

over, it has been found that on or about October 31, 1945, when under the terms of the Cincinnati agreement all workers were returned to work, the prop makers were denied reinstatement because of instructions issued through Pelton on behalf of the Producers Labor Committee and complied with by the respondent Warner.

It has also been found that on March 19, Fuhrmann, speaking on behalf of respondent Warner, advised all the prop makers that for their refusal to take jobs in the carpenter shop they would never again be employed in the motion picture industry. It has been found that thereby the respondent Warner engaged in interference, restraint, and coercion and denied employees rights guaranteed in Section 7 of the Act.

It has been found further, that on October 31, all the complainants named herein, except those previously reinstated, and more particularly those complainants who voluntarily absented themselves during the course of the strike, were denied reinstatement by various of the respondent Producers because the respondent Producers were carrying out the instructions of the Producers Labor Committee. These individuals thus were being discriminated against for having exercised individually and with others a protest against demands to do the work of strikers or take the jobs of individuals who were supporting the strike. It was found above and it is again emphasized that by such conduct on the part of the respondent Producers, the individual

workers were being punished for daring to protest in concerted fashion against the actions of the respondent Producers requiring them to act as strike breakers.

The violations of the Act herein found, particularly the discharges and refusal to reinstate, because of concerted activity, are by ordinary standards sufficiently grave in the undersigned's opinion to warrant the recommendation that the respondents be ordered to cease and desist from in any manner infringing upon the rights guaranteed in Section 7 of the Act.⁷² Ordinarily the undersigned would make such recommendation. It appears, however, that the respondent Producers enjoy closed-shop contracts with the Alliance and its locals. The only evidence of independent interference, restraint and coercion is contained in the statement of Fuhrmann, employed by respondent Warner. Because of the peculiar nature of the violation, the undersigned will not recommend that respondent Producers be ordered to cease and desist from in any manner infringing upon the rights guaranteed in Section 7 of the Act.

The undersigned found that respondent Warner discriminated regarding the hire and tenure of employment of the 14 prop makers named in Appendix A attached hereto. The reinstatement with back pay for the individuals named in the Appendix A

⁷²N.L.R.B. v. Express Publishing Company, 312 U. S. 426; May Department Stores Co. v. N.L.R.B., 326 U. S. 376.

will be in accordance with the following recommendations:

The undersigned will recommend that the respondent Warner offer Hand, Gidlund, Lamb, Sapp, Stoica and White immediate and full reinstatement to their former or substantially equivalent positions⁷³ without prejudice to their seniority or other rights and privileges. The undersigned further recommends that respondent Warner make them whole for any loss of pay they may have suffered by the reason of the respondent's discrimination against them by payment to each of them of a sum of money equal to that which he normally would have earned from the date of discrimination to the date of the offer of reinstatement, less his net earnings⁷⁴ during the said period.

Batchelder testified that he made no effort to secure a position in the motion picture industry during the course of the strike. Accordingly, the undersigned will recommend that the respondent Warner offer Batchelder immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other

⁷³In accordance with the Board's consistent interpretation of the term, the expression "former or substantially equivalent position" is intended to mean "former position wherever possible, but if such position is no longer in existence, then to a substantially equivalent position." See *Matter of The Chase National Bank of the City of New York, San Juan, Puerto Rico Branch*, 65 N.L.R.B. 827.

⁷⁴*Matter of Crossett Lumber Co.*, 8 N.L.R.B. 440, 497-498.

rights and privileges. The undersigned will further recommend that the respondent Warner make Batchelder whole for any loss of pay he may have suffered by the reason of the respondent's discrimination against him by payment to him of a sum of money equal to that which he normally would have earned from October 31, 1945, the date he was refused reinstatement, to the date of the offer of reinstatement less his net earnings during the said period.⁷⁵

Lora testified that he made no particular effort to secure employment after April 1, 1946. Accordingly it will be recommended that respondent Warner offer Lora immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges. The undersigned further recommends that respondent Warner make him whole for any loss of pay he may have suffered by reason of the discrimination against him by payment to Lora of a sum of money equal to that which he normally would have earned from the date of the discrimination up to April 1, 1946, less his net earnings during the said period.

Bonning testified that he made no effort to work during the course of the strike. He does not desire reinstatement. The undersigned will recommend that respondent Warner make Bonning whole for any loss of pay he may have suffered by reason of

⁷⁵The expression "former or substantially equivalent position," when used hereafter is defined in footnote 73, *supra*.

the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned from October 31, 1945, the date of respondent Warner's refusal to reinstate, to May 1, 1946, the date of regular employment elsewhere, less his net earnings during the said period.

MacKellar testified that during the first 3 months of the strike he spent his time working on his home. He was reinstated by respondent Warner about August 1, 1946, and voluntarily quit his employment on September 7, 1946. Accordingly reinstatement will not be recommended for MacKellar. However, the undersigned will recommend that respondent Warner make MacKellar whole for any loss of pay he may have suffered by reason of the respondent's discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned from the date of the discrimination up to August 1, 1946, the date of his reinstatement, less the period of 3 months which MacKellar spent working on his home, and less his net earnings during the said period.

DeSanctis was reinstated by respondent Warner on November 7, 1945. Accordingly, it will be recommended that respondent Warner make him whole for any loss of pay he may have suffered by reason of respondent Warner's discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned, from the date of the discrimination to the date of his reinstatement, less his net earnings during the said period.

Simpson. It appears from the record that due to ill health Simpson was unable to work on and after June 1, 1945, and was unable to resume his employment until about January 1, 1946. The undersigned will recommend that respondent Warner offer Simpson immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges. However, the undersigned recommends that respondent Warner make Simpson whole for any loss of pay he may have suffered by reason of the respondent's discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned from the date of the discrimination to June 1, 1945, and from January 1, 1946, thereafter to the date of the offer of reinstatement, less Simpson's net earnings during the two foregoing periods.

Jensen does not desire reinstatement, having found regular employment elsewhere, beginning about February 1, 1946. Accordingly, the undersigned recommends that respondent Warner make Jensen whole for any loss of pay he may have suffered by reason of the respondent's discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of the discrimination to February 1, 1946, when he found other regular employment, less his net earnings during the foregoing period.

Rogers was reinstated on February 12, 1946, by

respondent Warner. Accordingly, the undersigned recommends respondent Warner make Rogers whole for any loss of pay he may have suffered by reason of the respondent's discrimination against him by payment to him of a sum of money equal to that which he normally would have earned, from the date of the discrimination to the date of his reinstatement, less his net earnings during the foregoing period.

The effect of the expulsion from membership in the Alliance

In making the foregoing recommendations, the undersigned has considered the effect of the stipulation entered into between counsel for the Board and the Alliance that Stoica, Lora, Gidlund, and Lamb were expelled from the Alliance on June 14, 1946, and that Batchelder and Hand were suspended and by reason of non-payment of the fine imposed by the sentence, they likewise stood expelled from membership in the Alliance.

Counsel for the respondents and intervenor urge that by virtue of the closed shop contracts between the respondent Producers and the Alliance and its locals, only members in good standing in the locals can be employed, and expelled members cannot be reinstated by reason of membership disqualification. The unfair labor practices herein found occurred while all of the employees were in good standing in the Alliance. All were entitled to reinstatement on October 31, 1945, at which time they were in good standing, but for the unfair labor practices committed by the respondents. Nothing less than

restoration of the employees' status as it existed prior to the commission of any unfair labor practice, would effectuate the policies of the Act and preserve all the employees' rights, which it is the duty of the Board to protect. "There is nothing in the Act which limits the reinstatement remedy to members of labor organizations or even to striking employees who are primarily and directly aggrieved by an unfair labor practice which causes a strike."⁷⁶

The Act does not preclude the making of a valid closed shop contract. But when limitations of the contract conflict with the paramount obligation placed upon the Board to effectuate the policies of the Act, it is the undersigned's opinion that the rights of the Alliance to full enforcement of a closed shop agreement, must give way to the obligation placed upon the Board to effectuate the law of the land. The paramount obligation of the Board to effectuate the purposes of the Act requires that in doing so these employees be reinstated to the jobs they held prior to the discrimination against them. In the *Star Publishing* case,⁷⁷ the respondent urged its inability to comply with a Board order and the Court answered in this language:

Finally, respondent contends that compliance with the Board's order "from a practical stand-

⁷⁶N.L.R.B. v. Biles-Coleman Lumber Co., 98 F. 2d. 18, 23 (C.C.A. 9).

⁷⁷N.L.R.B. v. *Star Publishing Co.*, 97 F. 2d. 465, 470 (C.C.A. 9); *N.L.R.B. v. John Englehorn & Sons*, 134 F. 2d. 553, 557, 558 (C.C.A. 3).

point, means exactly the same situation which the respondent faced on the morning of July 2" and that it "would mean a closed plant" because the Drivers will refuse to haul the papers. Assuming that respondent's prophecy is correct, it is no obstacle to the enforcement of the order. By the act Congress has said that certain unfair labor practices cause strikes which have the effect of burdening interstate and foreign commerce. It has acted to protect such commerce, by prohibiting certain practices which it has termed "unfair." It did not choose to protect such commerce from all impediments or strikes, but simply attempted to prevent certain acts which would affect such commerce because such acts lead to strikes. No attempt was made to prevent strikes as such, but only certain acts which might cause strikes. The act of the Drivers in refusing to work, is not one of the acts prohibited. Respondent's contention in the last analysis, is that it is subjected to great hardship, which should also have been dealt with by Congress. We think that such an argument should be submitted to Congress but not to us. Whether or not Congress may deem it wise to enlarge its policy, will be pertinent here, but only when it has done so.

In the Wallace Corporation case,⁷⁸ where the

⁷⁸323 U.S. 248, 256; Local Lumber Workers Union v. N.L.R.B., 158 F. 2d. 365 (C.C.A. 9), 19 LRRM 2098; N.L.R.B. v. Graham, et al., F. 2d. (C.A.A. 9), 19 LRRM 2303 (decided February 13, 1947.

validity of a closed shop contract was under attack, the Supreme Court stated:

We do not construe the provision authorizing a closed shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the Act to protect for all workers. It was as much a deprivation of the rights of these minority employees for the company discriminatorily to discharge them in collaboration with Independent as it would have been had the company done it alone.

For these reasons the undersigned has recommended herein that reinstatement shall prevail without limitation by reason of membership disqualification, caused by expulsions occurring subsequent to the unfair labor practices.

There now remain remedy recommendations appropriate to the cases of the remaining complainants who were not discharged but were refused reinstatement. From the facts found above, these employees ceased work on various dates during the strike, in consequence of, and in connection with, a current labor dispute at the respondent Producers' studios and when they applied for and were refused reinstatement on or about October 31, 1945, they were still employees within the meaning of Section 2 (3) of the Act.⁷⁹ It has been heretofore

⁷⁹*Wilson & Co. v. N.L.R.B.*, 124 F. 2d. 845 (C.C.A. 7).

found that the respondents discriminated regarding the hire and tenure of employment of the employees hereafter mentioned, by refusing to reinstate them, or continuing them in employment on and after October 31, 1945.

The undersigned will accordingly recommend that respondent Warner offer to Goudie, Larson, Seward and Howe, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges. The undersigned further recommends that respondent Warner make them whole for any loss of pay they may have suffered by reason of respondent Warner's discrimination against them, by payment to each of them of a sum of money equal to that which he normally would have earned as wages from October 31, 1945, to the date of the offer of reinstatement, less his net earnings during the said period.

Coffey refused to cross the picket line at respondent Warner on and after March 12. He was denied reinstatement on October 31. The undersigned passes no judgment on Coffey's alleged addiction to alcohol, commented upon at some length above. It is true that it offered reasonable grounds for dismissal, but, since as heretofore indicated, it was not this reason, but rather Pelton's instructions which motivated the respondent Warner in refusing to reinstate Coffey, it is found that on October 31, Coffey was refused reinstatement because of his concerted activity, and it is recommended that the provisions

of the remedy set forth in the paragraph above apply with equal force to Coffey.

Cuccia testified that after collapse of a private business venture in February, 1946, he made no effort to secure work other than at respondent Columbia. It is recommended that respondent Columbia offer immediate and full reinstatement to Cuccia, to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges. The undersigned further recommends that the respondent Columbia make Cuccia whole for any loss of pay he may have suffered by reason of the respondent Columbia's discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned from October 31, 1945, to February 15, 1946,⁸⁰ less his net earnings during the said period.

Stanley does not desire reinstatement. He was, however, refused employment on October 31, and given irregular employment thereafter by respondent Warner and other producers until about November 29, 1945, when for the reasons heretofore stated, his name was stricken from respondent Warner's call list. Accordingly, it will be recommended that respondent Warner make Stanley whole for any loss of pay he may have suffered by reason of the respondent's discrimination against him by payment to him of a sum of money equal to that which

⁸⁰Approximate date selected as the time when Cuccia dropped his private business venture.

he normally would have earned from October 31, 1945, to on or about November 29, 1945, less his net earnings during the said period.

Hentschel was reinstated by respondent Columbia on October 31, but at the end of the day was placed on call because of compliance with Pelton's instructions. The undersigned will recommend therefore, that the respondent Columbia offer Hentschel immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges. This recommendation is made, in order to effectuate the purposes of the Act, although it appears that in June of 1946, Hentschel was expelled from the Alliance. The undersigned further recommends that the respondent make Hentschel whole for any loss of pay he may have suffered by reason of the respondent's discrimination against him by payment to him of a sum of money equal to that which he normally would have earned from November 1, 1945, to the date of the offer of reinstatement, less his net earnings during the said period.

Ames was denied reinstatement on October 31, 1945, by respondent Republic, but was offered employment in January, 1946, which Ames rejected, with the understanding that he would acquaint respondent Republic when he was willing to accept employment. It appears from the record that he has never done so, hence no recommendation will be made respecting his reinstatement by respondent Republic. However, the undersigned does recom-

mend that respondent Republic make Ames whole for any loss of pay he may have suffered by reason of the respondent's discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned from October 31, 1945, to January 15, 1946,⁸¹ less his net earnings during the said period.

Groth was denied reinstatement by respondent Loew on or about November 3, 1945. He does not desire reinstatement, since March 9, 1946, when he found regular employment elsewhere in the motion picture industry. The undersigned does recommend that respondent Loew make Groth whole for any loss of pay he may have suffered by reason of respondent Loew's discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned from November 3, 1945, to March 9, 1946, less his net earnings during the said period.

Selgrath was refused reinstatement as a key grip by respondent Loew on November 1, 1945. Respondent Loew acknowledged Selgrath's application for "employment" but asserts it was refused because of advice that Selgrath was no longer a member in good standing of Local 80; that upon being advised by Local 80 on December 19, 1945, that Selgrath was then in good standing, he was offered employment. The issue of Selgrath's union membership

⁸¹This date is chosen as an approximation of the time when he was offered employment by respondent Republic.

involving a question of internal union affairs was not litigated at the hearing. Selgrath did testify that he had always been a member in good standing of Local 80 and had never been advised by anyone connected with the Local that he was not in good standing. Walsh testified that he was advised by Local 80 on October 31, or November 1, that Selgrath was not to be employed because he was no longer in good standing as a member. In addition, Walsh had before him a copy of Pelton's instructions and he acknowledged that these instructions applied to Selgrath. The undersigned is of the opinion and finds that Selgrath was refused reinstatement on November 1, 1945, because respondent Loew complied with Pelton's instructions.

Selgrath was reinstated by respondent Loew as a grip on December 19, 1945, which was not the position he held in March of 1945. Accordingly, it will be recommended that respondent Loew offer Selgrath immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges.⁸² The undersigned further recommends that respondent Loew make him whole for any loss of pay he may have suffered by reason of respondent's discrimination against him by payment to Selgrath of a sum of money equal to that which he normally would have earned as a key company grip from November 1, 1945, to December 19, 1945, and

⁸²Matter of Western Felt Works, 10 N.L.R.B. 407, 450.

further that he be paid any difference in wages between that which he would have earned as a key company grip on and after December 19, 1945, and that which he earned as a grip after that date, up to the date of the offer of reinstatement to his old job as a key company grip, less his net earnings during the said period.

Mailes was refused reinstatement on October 31, 1945, but reinstated by respondent Twentieth Century on February 15, 1946, and worked thereafter until June 16, 1946, when he was expelled from the Alliance. Because this expulsion took place after respondent Twentieth Century attempted to restore the status quo, so far as Mailes was concerned, no recommendation will be made that Mailes be reinstated to his former job. However, the undersigned does recommend that respondent Twentieth Century make Mailes whole for any loss of pay he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned from October 31, 1945, to February 15, 1946, less his net earnings during the said period.

Reinstatement for all of the foregoing employees ordered reinstated shall be effected in the following manner: The undersigned recommends that the respondent Producers be required to displace employees by transfer or otherwise who have succeeded to the former positions of any of these employees. Further, all employees hired on and after March 12, 1945, for the same or substantially equivalent posi-

tions, shall, if necessary to provide employment to the persons to be offered reinstatement, be dismissed. If, even after this is done, there is not by reason of a reduction in force of employees needed, sufficient employment immediately available for the remaining employees, including those to be offered reinstatement, all available positions shall be distributed among remaining employees, in accordance with the respondent Producers' usual method of reducing its forces, without discrimination against any employee because of his union affiliation or activity, following a system of seniority to such extent as has heretofore been applied in the conduct of the respondent Producers' business. Those employees remaining after such distribution, for whom no employment is immediately available, shall be placed upon a preferential list prepared in accordance with the principles set forth in the previous sentence, and shall thereafter, in accordance with such lists, be reemployed in their former or substantially equivalent position as such employment becomes available and before other persons are hired for such work.⁸³

On the basis of the above findings of fact and the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators

⁸³Matter of Firth Carpet Co., 33 N.L.R.B. 191.

of the United States and Canada, Locals Nos. 44, 80, 727 and 728, affiliated with the American Federation of Labor, are labor organizations within the meaning of Section 2(5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of the employees named in Appendices A and B of this report, thereby discouraging membership in the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, the respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(3) of the Act.⁸⁴

3. By interfering with, restraining and coercing its employees in the exercise of the rights guar-

⁸⁴Respondents urge in their brief that there is a failure of proof that by the discharges and refusals to reinstate, membership in the Alliance was discouraged and that consequently the complaint must be dismissed. Such contention is without merit. While the discouraging effect of discharges may not manifest itself immediately under these circumstances, the possibility that such effect will be demonstrated in the future, is not foreclosed. Indeed, a discharge which is directed against concerted or union activity per se discourages membership in a labor organization involved. As the Court stated in *N.L.R.B. v. John Englehorn & Sons*, 134 F. 2d. 553, 556, 557, (C.C.A. 3),

“All that need be established to show a violation of §8 is conduct by an employer which is defined therein as an unfair labor practice. That section does not require proof that the prescribed conduct had its desired effect.”

anted in Section 7 of the Act, respondent Warner has engaged in and is engaging in unfair labor practices within the meaning of Section 8(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent Columbia, respondent Republic, respondent Loew, respondent Twentieth Century, and respondent Association have not violated Section 8(1) of the Act by threatening employees that they would never work again in the motion picture industry.

6. The respondent Producers and the respondent Association have not violated Section 8(1) of the Act, by the payment of bonuses to those employees who passed picket lines or performed the work of strikers during the strike of March 12 to October 31, 1945.

7. The respondent Producers and the respondent Association have not violated Section 8(1) of the Act by interrogating employees with respect to their union membership and affiliation.

8. Respondent RKO has not engaged in unfair labor practices within the meaning of Section 8(1) or (3) of the Act.

Recommendations

Upon the basis of the above findings of fact and conclusions of law, the undersigned recommends

that respondent Columbia Pictures Corporation, Los Angeles, California; respondent Republic Productions, Inc., Los Angeles, California; respondent Warner Bros. Pictures, Inc., Burbank, California; respondent Loew's, Incorporated, Culver City, California; respondent Twentieth Century-Fox Film Corporation, Los Angeles, California, and respondent Association of Motion Pictures Producers, Inc., Los Angeles, California, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, A. F. of L., any of its affiliated locals or any other labor organization of its employees, by discharging and refusing to reinstate any of their employees, or by discriminating in any other manner with respect to their hire or tenure of employment or any terms or conditions of employment;

(b) Utilizing, applying, or administering the closed-shop provisions of their contracts with the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, or any of its locals, in such manner as to discharge or otherwise discriminate against any of their employees for exercising their rights under the National Labor Relations Act to engage in concerted protests or activities concerning terms or conditions of their employment;

(c) Engaging in any like or related act or conduct which interferes with, restrains, or coerces their employees in their effort to engage in concerted protests or activities concerning the terms and conditions of their employment.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Respondent Warner will offer to Lynn G. Batchelder, Carl H. Gidlund, George M. Hand, Leo L. Lamb, Raymond M. Lora, Jesse L. Sapp, George Stoica, Jr., William J. Simpson, William G. White, Kenneth B. Coffey, John C. Goudie, Willis F. Howe, Charles J. Larson and Fred Seward immediate and full reinstatement to their former or substantially equivalent positions,⁸⁵ without prejudice to their seniority or other rights and privileges.

Respondent Columbia will offer to Joseph P. Cuccia and Irwin P. Hentschel, immediate and full reinstatement to their former or substantially equivalent positions,⁸⁶ without prejudice to their seniority and other rights and privileges.

Respondent Loew will offer to John L. Selgrath immediate and full reinstatement to his former or substantially equivalent position⁸⁷ without prejudice to his seniority and other rights and privileges.

Reinstatement to their former or substantially equivalent positions in accordance with the fore-

⁸⁵See footnote 73 supra.

⁸⁶Id.

⁸⁷See footnote 73 supra.

going recommendations, shall be in the manner set forth in the section entitled "The remedy" above, placing those employees for whom employment is not immediately available upon a preferential list, in the manner set forth in said section, and thereafter, in said manner, offer them employment as it becomes available;

(b) Make whole those employees listed in Appendices A and B for any loss of pay they may have suffered by reason of the respondent's discrimination against them in regard to their hire and tenure of employment, in accordance with the recommendations set forth in "The remedy," less their net earnings during the said periods;

(c) Post in conspicuous places throughout the studios of the respondent Columbia, Los Angeles, California; respondent Republic, Los Angeles, California; respondent Warner, Burbank, California; respondent Loew, Culver City, California; respondent Twentieth Century, Los Angeles, California; and in the offices of the respondent Association, Los Angeles, California, copies of the notice attached hereto marked Appendix C. Copies of said notice to be furnished by the Regional Director for the Twenty-first Region, after being signed by the respondents' representatives, shall be posted immediately by the respondents upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondents

to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days from the date of the receipt of this Intermediate Report, what steps the respondents have taken to comply herewith.

It is further recommended that unless on or before ten (10) days from the date of the receipt of this Intermediate Report, the respondents notify the Regional Director in writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondents to take the action aforesaid.

It is also recommended that the allegations of the amended consolidated complaint, that the respondents engaged in interference, restraint, and coercion, by the payment of bonuses to employees who passed the picket lines or performed the work of strikers during the strike above described, be dismissed.

It is recommended also that the allegation of the amended consolidated complaint, that the respondents engaged in interference, restraint, and coercion by interrogating employees with respect to their union membership and affiliation be dismissed as against all respondents.

It is recommended that the allegation of the amended consolidated complaints that the respondents engaged in interference, restraint, and coercion by threatening the employees that they would never

work in the motion picture industry again if they refused to perform the work or take the jobs of striking employees be dismissed as against respondent Columbia, respondent Republic, respondent Loew, respondent Twentieth Century, and respondent Association.

It is recommended that the allegations of the amended consolidated complaint that respondent Warner discriminated against H. B. MacDonald be dismissed.

It is finally recommended that the amended consolidated complaint be dismissed as against respondent RKO.

As provided in Section 203.39 of the Rules and Regulations of the National Labor Relations Board, Series 4, effective September 11, 1946, any party or counsel for the Board may, within fifteen (15) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.38 of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof; and any party or counsel for the Board may, within the same period, file an original and four copies of a brief in support of the Intermediate Report. Immediately upon the filing of such state-

ment of exceptions and/or briefs, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.65. As further provided in said Section 203.39, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the board.

Dated: March 20, 1947.

/s/ MORTIMER RIEMER,
Trial Examiner.

Appendix A

Lynn G. Batchelder	Raymond M. Lora
Robert N. Bonning	Donald MacKellar
Paul DeSanctis	J. Harold Rogers
Carl H. Gidlund	Jesse L. Sapp
George M. Hand	George Stoica, Jr.
Charles Jensen	William J. Simpson
Leo L. Lamb	William G. White

Appendix B

Robert W. Ames	Willis F. Howe
Kenneth B. Coffey	Charles J. Larson
Joseph P. Cuccia	Eugene V. H. Mailes
John C. Goudie	John L. Selgrath
George I. Groth	Fred Seward
Irwin P. Hentschel	Paul L. Stanley

Appendix C

Notice to all Employees Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not discourage membership in International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Locals Nos. 44, 80, 727, and 728, A. F. of L., or any other labor organization of our employees, by discharging or refusing to reinstate any of our employees, or by discriminating in any other manner with respect to their hire or tenure of employment or term or condition of employment.

We Will Not apply, administer, or put into operation the closed shop provisions of our contracts with the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local Nos. 40, 80, 727, and 728, A. F. of L., or of any contract executed in the future, in such manner as to discourage membership in the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Locals Nos. 44, 80, 727, and 728, A. F. of L., or any other labor organization of our employees, by discharging or otherwise discriminating against any of our employees for exercising their rights under the National Labor Relations Act to engage

in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

We Will Not engage in any like or related act or conduct which interferes with, restrains, or coerces our employees in their efforts to engage in concerted activities over terms and conditions of employment or other mutual aid or protection during the term of closed shop contracts presently in existence or that may be executed in the future.

We Will Offer to the employees named below, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination against them in accordance with the recommendations of the Intermediate Report.

Lynn G. Batchelder

Leo L. Lamb

Kenneth B. Coffey

Charles J. Larson

Joseph P. Cuccia

Raymond M. Lora

Carl H. Gidlund

Jesse L. Sapp

John C. Goudie

John L. Selgrath

George M. Hand

Fred Seward

Irwin P. Hentschel

William J. Simpson

Willis F. Howe

George Stoica, Jr.

William G. White

* * *

COLUMBIA PICTURES
CORPORATION,

Employer.

By

Representative. Title.

Dated.....

REPUBLIC PRODUCTIONS,
INC.,

Employer.

By

Representative. Title.

Dated.....

WARNER BROS. PICTURES,
INC.,

Employer.

By

Representative. Title.

Dated.....

LOEW'S INCORPORATED,
Employer.

By

Representative. Title.

Dated.....

TWENTIETH CENTURY-FOX
FILM CORPORATION,

Employer.

By

Representative. Title.

Dated.....

ASSOCIATION OF MOTION
PICTURE PRODUCERS,
INC.,

Employer.

By

Representative. Title.

Dated.....

Note: Any of the Above-Named Employees Presently Serving in the Armed Forces of the United States Will Be Offered Full Reinstatement Upon Application in Accordance With the Selective Service Act After Discharge From the Armed Forces.

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Causes.]

Before: Mortimer Riemer,
Trial Examiner.

Appearances:

ROBERT RISSMAN,

Appearing on behalf of the National Labor
Relations Board.

O'MELVENY & MYERS, By

HOMER I. MITCHELL,

W. W. ALSUP,

Appearing on Behalf of Columbia Pictures
Corporation, Republic Productions, Inc.;
Warner Bros. Pictures, Inc.; Loew's, In-
corporated; Twentieth Century-Fox Film
Corporation and Association of Motion
Picture Producers, Inc.

MICHAEL G. LUDDY,

Appearing on Behalf of International Al-
liance of Theatrical and Stage Employees
and Moving Picture Machine Operators
of the United States and Canada.

PROCEEDINGS

* * *

Mr. Rissman: If the Examiner please, I desire
to offer in evidence the formal Board exhibits at

this time, some of which will not be original exhibits in this trial, as I will explain together with the offer.

These will be Board's Exhibits Nos. 1 to 7, inclusive.

(Thereupon, the documents above referred to were marked Board's Exhibits Nos. 1 to 7 for identification.)

Mr. Rissman: As Board's Exhibit No. 1, there is offered copy of the order of the National Labor Relations Board, dated July 18, 1946, consolidating the eight cases which are to be heard now, and one other case which was later severed from these eight. The original certified copy of that order was introduced in evidence in Case No. 21-C-2735.

As Board's Exhibit No. 2, there is offered a copy of the consolidated complaint and consolidated notice of hearing, these documents being dated July 19, 1946, the complaint being signed by Stewart Meacham, regional director for the [19*] Twenty-first Region. And together with those documents are copies of the various charges upon which the consolidated complaint was issued. The original charges upon which that complaint was issued and upon which the final amended complaint in this proceeding was issued has been introduced in evidence in Case No. 21-C-2735, and appears in that record as Board's Exhibit No. 2 there. The originals normally are made part of the proceeding which is going to hearing. I wonder if counsel for re-

* Page numbering appearing at top of page of original Reporter's Transcript.

spondents will stipulate that the copies may be used in this proceeding in lieu of the originals, due to the fact that the originals are in evidence in the other case? If not, I will have to ask leave to withdraw the originals from that case and make them part of the record here.

Mr. Mitchell: Copies of what, Mr. Rissman?

Mr. Rissman: The charges upon which these eight cases are presently going forward, the original documents which were signed by—I think Ben Margolis signed most of them.

Mr. Mitchell: I don't have any objection to your using copies.

Trial Examiner Riemer: So stipulated.

Mr. Rissman: As Board's Exhibit No. 3, there is offered a copy of motion to sever, filed by counsel for the respondents requesting that Case No. 21-C-2735 be severed from the eight cases with which we are proceeding now. That [20] document is dated August 16, 1946, and was filed at the regional office on August 19, 1946. The original motion to sever is likewise an exhibit in proceeding 21-C-2735.

As Board's Exhibit No. 4, there is also offered a copy of an order of the National Labor Relations Board, dated August 30, 1946, severing the cases as requested in the motion which is Board's Exhibit No. 3.

As Board's Exhibit No. 5 there is offered the amended consolidated complaint issued in this proceeding, dated September 3, 1946, and signed by Stewart Meacham, regional director of the Twenty-first Region of the National Labor Relations Board.

Attached to this amended consolidated complaint are the copies of the various charges we have spoken about, and about which Mr. Mitchell stipulates copies may be used instead of the originals.

As Board's Exhibit No. 6, there is offered the original notice of hearing, dated September 4, 1946, setting this matter for hearing on September 16, 1946.

As Board's Exhibit No. 7, there is offered the answer of respondents in this present proceeding, the original having been filed and served on September 16, 1946.

That concludes my offer of exhibits at this time.

Trial Examiner Riemer: Is there any objection, Mr. Mitchell?

Mr. Mitchell: No. Of course, you have omitted the [21] motion to make more definite and certain, or for a bill of particulars, which was filed in response to the original consolidated complaint, and——

Mr. Rissman: You are right. That is an oversight. [22]

* * *

Trial Examiner Riemer: Mr. Luddy, do you have any objection?

Mr. Luddy: No.

Trial Examiner Riemer: The Board's offer is accepted, and the reporter will please mark the offered documents in evidence as Board's Exhibits 1, 2, 3, 4, 5, 6 and 7.

(Thereupon, the documents referred to were marked as Board's Exhibits Nos. 1 to 7, inclusive, and received in evidence.)

Mr. Rissman: Mr. Mitchell, just to keep the record straight, there are no affidavits of service on any of these documents. You acknowledge service for all the respondents named in this proceeding for whom you filed an answer? [24]

Mr. Mitchell: Yes, all of the respondents for whom I filed an answer were served with the amended consolidated complaint, yes. [25]

* * *

JESSE L. SAPP

a witness called by and on behalf of the National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. Jesse L. Sapp.

Q. Where do you live, Mr. Sapp?

A. 448 North Frederick Street, in Burbank.

Q. Were you employed at Warner Bros. at any time? A. Yes, sir.

Q. When did you work there?

A. From 1936 until March 19, 1945. [34]

* * *

Q. (By Mr. Rissman): What was your job while you worked for Warner Bros.?

(Testimony of Jesse L. Sapp.)

A. I was a foreman in the prop shop, subforeman.

Q. What do you mean by the prop shop?

A. That is a shop where they milled all of the props, miniatures, and stuff like that for the making of pictures.

Q. How long were you foreman in the prop shop?

Mr. Mitchell: Now, just a moment. I object to that on the ground it assumes a fact not in evidence. I thought I heard him say he was subforeman.

The Witness: Subforeman.

Mr. Rissman: I am sorry. Subforeman. [35]

The Witness: There was a part of that time when I was a foreman, and a part of it I was subforeman.

Q. (By Mr. Rissman): Well, how long were you foreman?

A. Well, let's see. I would say for a matter of about four years.

Q. From when until when?

A. I had charge of one of the shifts, what was called the night shift, from 6:00 o'clock until 12:00 midnight.

Q. During what period of time were you in charge of that? That is, what years?

A. From 1938 until about 1942, as near as I can state it.

Q. And after 1942 what was your position there?

A. I was a subforeman there then. They changed their system a little bit and had a general foreman, and we all acted under him.

(Testimony of Jesse L. Sapp.)

Q. And who was the general foreman under whom you acted? A. Mr. Jesse White.

Q. And was there anyone else in charge of the prop shop under whose supervision you worked?

A. Yes, Mr. James Gibbons was superintendent of the prop shop.

Q. How long have you been in the motion picture industry, Mr. Sapp? A. Since 1928.

Q. And what kind of work have you done since that time? [36]

A. I have been entirely in the prop shop and miniature building.

Q. Will you explain for us what are props, and give us some examples?

A. There has been a lot of controversy over what are props in this jurisdictional stuff sometimes, but my conception of that is that it is all objects on a motion picture set that are movable and are not a part of the set itself.

Q. And what are the miniatures?

A. Miniatures are sets built in miniature, as the name implies. It is built on a small, reduced scale.

* * *

Q. During the time that you were working at Warner Bros., were you a member of any labor organization?

A. I was a member of Local 44, I.A.T.S.E.

Mr. Rissman: May the record show that the International Alliance of Theatrical and Stage Employees and Motion Picture Operators of the United

(Testimony of Jesse L. Sapp.)

States and Canada, affiliated with the American Federation of Labor, is known and may be known in this record as I.A.T.S.E.?

Mr. Luddy: It is all right with me.

Q. (By Mr. Rissman): How long were you a member of Local 44 of the I.A.T.S.E.?

A. Since its formation.

Q. And approximately when was that?

A. I believe that was '39. Previous to that it was Local 37 of the same union, I.A.T.S.E.

Q. How long have you been a member of any local of the [40] I.A.T.S.E.?

A. Since 1936.

Q. Were you ever a member of any other labor organization while working in the studios?

A. I was a member of the United Brotherhood of Carpenters and Joiners in 1928 for a while.

Q. And how long did you remain a member of that union?

A. I would say it was approximately two years. We were building the miniatures under that local at that time.

Q. Well, from approximately 1930 to 1936 were you a member of any labor organization in the studios in the motion picture industry?

A. I got out of the motion picture industry in 1931, and went back in in 1935.

Q. And since you have been back, up until the date of your termination at Warner Bros., March 19, 1945, you were a member of Local 37 and Local 44 of the I.A.T.S.E.?

(Testimony of Jesse L. Sapp.)

A. With the exception of six months. When the I.A.T.S.E. was reformed in the studios was when I joined Local 37.

Q. Since 1936 or 1937 have you ever been employed, or were you employed in the carpenter shop of Warner Bros. as a carpenter?

A. I never was employed in the carpenter shop at any time.

Q. For what employees or what group of employees was Local 44, I.A.T.S.E. the bargaining agent while you were working at [41] Warner Bros. up to March 19, 1945?

Mr. Luddy: Now, just a moment. I object to that, if the Examiner please. It assumes a fact not in evidence. The Trial Examiner can take judicial notice of the rulings of the Board, and I take it for granted he will. The assumed fact is contrary to what the fact is. Local 44 has never been certified as the bargaining agent. The I.A.T.S.E. has been the bargaining agent and so certified by this Board back in 1939.

Trial Examiner Riemer: Sustained.

Q. (By Mr. Rissman): Do you know if Local 44 was bargaining for any particular group of employees at Warner Bros. during the time you were working there?

A. I know that the business agent of Local 44 had told us at various times that he was in on bargaining meetings as far back as New York. Personally, I couldn't say.

(Testimony of Jesse L. Sapp.)

Q. For what employees?

A. Well, that would be for the entire membership of Local 44.

Q. And what employees were members of Local 44, what type of employees?

A. There are several different crafts in that local. There is the prop shop, property men. I don't think I could name them all but there is several of them that is in there.

Mr. Luddy: They are set forth in an exhibit which was [42] in the Machinists' case, if Mr. Rissman wants it, that contract and working conditions that we had in the other case set them all out, 22 different classifications.

The Witness: I think I can give you that exactly, what those are, in just a moment.

Mr. Rissman: It isn't necessary at this time, Mr. Sapp.

The Witness: All right.

Mr. Rissman: We can get another exhibit.

Q. (By Mr. Rissman): Do you know what labor organization represented employees in the carpenter shop at Warner Bros. during the time that you were employed in the prop shop?

A. I believe it was Local 946 of United Brotherhood of Carpenters and Joiners.

Q. Do you know Francis Fuhrmann?

A. I do.

Q. Who is he?

A. He is the superintendent of the crafts building, as they call it, at Warner Bros. That includes

(Testimony of Jesse L. Sapp.)

carpenter shop, tin shop, blacksmiths, painters, and plasterers, I believe. I am not sure whether he is over the scenic artists or not.

Q. Who was the superintendent of the carpenter shop at Warner Bros. during the time you worked in the prop shop?

A. Dick Mills, I believe, had direct charge of this.

Q. And, Mr. Sapp, when I ask any of these questions I am asking you about the period you worked there, and prior to [43] March 19, 1945, unless I specifically say otherwise? A. Yes.

Q. Is that what you have understood up until now in all these questions?

A. That is right.

Q. Do you recall, Mr. Sapp, when the strike occurred in March, 1945?

A. Very distinctly.

Q. Now, the calendar shows that March 12, 1945, was a Monday. Keeping that in mind, can you tell us what kind of work you were doing on March 10, 1945, which would be the Saturday immediately preceding the strike?

A. I was building a piano with a lucite top on it.

Q. Where was that work being done?

A. In the cabinet shop, which is connected with the prop shop of Warner Bros.

Q. Had you completed that job at the close of your work on March 10?

(Testimony of Jesse L. Sapp.)

A. No, it was not completed.

Q. Did you go to work on March 12, 1945?

A. No, I did not.

Q. When was the next time you went to work after March 10, 1945?

A. The morning of March 14.

Q. And where did you work on March 14, and what kind of [44] work did you do that day?

A. It was on that same piano.

Q. That is in the cabinet shop?

A. That is right.

Q. Which is part of the prop shop?

A. That is right.

Q. Did you continue that work all that day on March 14?

A. For the balance of that week we were on it.

Q. Directing your attention to Saturday, March 17, 1945, did you work on that day?

A. Yes, I worked on Saturday.

Q. Did you have any conversation on that day with Mr. Fuhrmann? A. I did.

Q. Where did the conversation take place?

A. In Mr. Fuhrmann's office.

Q. Who was present at that time?

A. Carl Gidlund, Harold Horner, and myself.

Q. How did you happen to be in Mr. Fuhrmann's office at that time?

A. The boys had heard a rumor that they were going to be asked to do carpenter work, and they

(Testimony of Jesse L. Sapp.)

asked me to go up and meet with "Fuzzy" Fuhrmann and have a talk with him, and ascertain what we were expected to do.

Q. What time of the day was that conversation with Mr. [45] Fuhrmann?

A. I believe it was about 2:00 o'clock in the afternoon, maybe a little before, probably 1:00 o'clock.

Q. And did you see or hear Mr. Fuhrmann at any time before 1:00 or 2:00 o'clock, Saturday, March 17, 1945?

A. I don't recall seeing him that day. I am not sure as to just what time it was when we went up there. It might have been before the lunch hour.

Q. What did Mr. Fuhrmann say to you and the other men who were present? Before you go into that, tell us who they were. You mentioned Carl Gidlund.

A. Carl Gidlund, he was one of the members that was expelled with some of the rest of them from the local.

Q. Was he a prop worker? A. Yes.

Q. What are some of the others?

A. Harold Horner was a prop maker, working as a pattern maker at the time.

Q. Who else?

A. Just the three of us.

Q. Tell us what conversation you and the others had at this time and place.

(Testimony of Jesse L. Sapp.)

A. We told Mr. Fuhrmann we had heard rumors that they were going to ask us to go into the carpenter shop and do carpenter work. Mr. Fuhrmann said, "As far as I am personally concerned, there will be no one asked to go outside of their jurisdiction, and no one will be fired for refusing to go outside of their jurisdiction." We told him that was good enough for us, and we went back to the prop shop and told the boys what he had told us. But I don't think it was an hour later he called me on the phone and told me he might be forced to change that statement and ask us to go into the mill on Monday morning.

Q. What do you mean by "the mill"?

A. That was the carpenter shop.

Q. Is that what you understood him to mean?

A. Oh, yes, definitely.

Q. Is that what the carpenter shop is commonly referred to?

A. Yes.

Q. As the mill?

A. Yes, that is right.

Q. Did you have any further conversation with Mr. Fuhrmann or any other representative of the company on Saturday, March 17, 1945?

A. I did with my immediate superior, Jim Gibbons. He called me back into what he calls his laboratory. He has got a sort of a chemical laboratory back of the office. And he asked me to make a poll of the prop shop and ascertain the desires of the boys and their actions in case they did demand them to go into the prop shop. [47]

(Testimony of Jesse L. Sapp.)

Q. You mean into the carpenter shop?

A. That is right, into the carpenter shop.

Q. What did you say to him?

A. I told him that I would, and I did. I went to every fellow in the prop shop and asked him what he would do in case they were told to go into the mill. Most of them asked me what I would advise them to do. I told them I couldn't advise them, only tell them what I intended to do, and that I didn't intend to. That was about all there was to that that day.

Q. Now, directing your attention to Monday, March 19, 1945, did you go to work on that day?

A. I did.

Q. Where did you go to work?

A. In the prop shop, on the same piano where I had been.

Q. On that day did you have any conversation with Mr. Gibbons or Mr. Fuhrmann, or did they say anything to you?

A. Mr. Fuhrmann came down, I think it was around 10:00 or 10:30, some time about that time, and he called all of the members of the prop shop together and he sat down on what they call a wall plat. It was just an improvised platform. And he faced all the boys and he told them they were going to be expected to go into the mill and do the carpenter work. In fact, he told them if they did not go into the mill and do the carpenter work that they would be eliminated from the [48]

(Testimony of Jesse L. Sapp.)

studios. I asked him at the time myself if he didn't think it was wise to ascertain how many of the boys would go into the carpenter shop. He said he thought it was. So I put the question to them and asked them how many of them wanted to go into the carpenter shop.

Q. You say you put the question to them. You mean the prop makers?

A. I did, to the bunch of boys that was there present.

Q. Approximately how many was that?

A. 38. And I asked them how many of them wanted to go into the mill. Some fellows said, "What the hell do you mean, want to go into the mill?" I said, "We will change it. How many will refuse to go into the mill?" It was unanimous. Every hand went up. I turned to Mr. Fuhrmann and told him, "I think that is your answer, 'Fuzzy'," and he said, "All right, boys. We have got lots of prop work left. Have to it."

Q. Is "Fuzzy" Mr. Fuhrmann's nickname?

A. Yes.

Q. All right.

A. He left, I would judge it was about a half hour. And later, I would say it was around 2:00 o'clock, Mr. Gibbons came around and handed every one of us a blue discharge slip signed by Mr. Fuhrmann that we were discharged for refusing to do carpenter work. And in the meantime, now——[49]

(Testimony of Jesse L. Sapp.)

Q. Just a minute. When Mr. Fuhrmann said to you and the others assembled there if you refused to work in the carpenter shop you would be removed from the studios——

A. Eliminated, I believe was the word he used.

Q. Eliminated from the studios. What did you understand that to mean?

A. I understood that we would just plain be fired if we didn't do it.

* * *

Q. We will get to that. Before this meeting attended by Mr. Fuhrmann, was there any other meeting of the prop men in the department that day, that is, Monday, March 19, 1945?

A. They were called together in the mill.

Q. In the carpenter mill?

A. Yes, in the carpenter shop. They all assembled out there. In fact, I think it was everyone that was working in the crafts building at the time, tinnners as well as some of the others. They were called together in there, and they were addressed by Mr. Roy Brewer of the International Alliance.

Trial Examiner Riemer: Will you fix the time of this meeting with respect to the one attended by Fuhrmann? [50]

Q. (By Mr. Rissman): Yes. Was this meeting before or after?

A. Yes, this was before, at 9:00 o'clock in the morning was when Brewer came in.

(Testimony of Jesse L. Sapp.)

Q. What time was the meeting you testified about before called by Fuhrmann?

A. I believe it was about 10:30 or 11:00; near that time, anyway.

Q. Was that the same day?

A. Yes, it was.

Q. About an hour and a half or two hours apart?

A. Yes.

Mr. Rissman: And can we stipulate, Mr. Mitchell and Mr. Luddy, that Roy Brewer is International representative of the I.A.T.S.E.?

Mr. Luddy: And was at that time?

Mr. Mitchell: Yes.

Mr. Rissman: Thank you.

Q. (By Mr. Rissman): Who else spoke at that morning session where Mr. Brewer was?

A. I think Mr. Brewer was the principal speaker. I don't remember of anyone else talking.

Q. What did Mr. Brewer say?

A. He told us practically the same thing Mr. Fuhrmann had told us, that we were expected to go into the carpenter shop [51] and do that work, or any other work the studio required us to do, under penalty of being eliminated from the studio.

* * *

Q. Do you know what your seniority status was at the studio in the prop shop?

A. I think Mr. White——

Mr. Mitchell: Now, just a minute. Let him answer yes or not.

(Testimony of Jesse L. Sapp.)

Trial Examiner Riemer: Do you know?

The Witness: Yes, I do.

Q. (By Mr. Rissman): What was it?

A. There was two men that had greater seniority than myself.

Q. Who were they?

A. Mr. Gus White and James B. Peck.

Q. What kind of membership did you have in Local 44, I.A.T.S.E.?

A. The cards were lettered A, B, C and D, I believe, and I had an A card.

Q. And do you know the difference between the A, B, C and D card memberships?

A. It was seniority. The B members dated, I think it was September, 1942, if I remember right, that the B members were dated from after that. Members that were taken in after that — I believe that was the date — were rated as B and C, according to the groups they were taken in.

Q. In addition to the A, B, C and D cards, to your knowledge was there any provision for persons working under [54] special permit in 1944?

A. There was no special provision for it. In fact, I have heard Mr. Walsh say they didn't have permits, but definitely they did at Warner Bros.

Q. When you say Mr. Walsh, to whom do you refer?

A. Mr. Walsh is the International president of the International Alliance.

Q. That is Mr. Richard Walsh?

A. That is right.

(Testimony of Jesse L. Sapp.)

Q. After Mr. Gibbons handed you this blue slip about 2:00 o'clock on March 19, 1945, did you leave the studio?

A. I did. I went home at 2:30. That was the end of the shift.

Q. Did you ever go back to the studios at any time after that to see Mr. Fuhrmann or Mr. Gibbons or any of the other Warner Bros. people?

A. I went in to get my tools about 6:00 o'clock, but in the meantime I had had——

Q. On the same day?

A. Yes. I had had a conversation with them both on the telephone.

Q. With whom did you have the conversation first?

A. What is that?

Q. With whom did you have the first telephone conversation?

A. Mr. Gibbons. [55]

Q. When was it?

A. Mr. Gibbons called me, I would say it was around 4:30 or 5:00 o'clock, and told me they were going to have a meeting of all of the prop shop boys at Mr. Fuhrmann's office at 6:00 o'clock, and asked me to come down. I told him I would.

Q. Were you there?

A. I was not. Mr. Fuhrmann called me a few minutes later and told me I wasn't wanted at that meeting; I was excluded from that meeting.

Q. Gibbons invited you and Fuhrmann told you not to come?

A. That is right.

Q. So you didn't go?

A. That is right.

Q. Did you go back to get your tools that day?

(Testimony of Jesse L. Sapp.)

A. At 6:00 o'clock I went in and picked up my tools.

Q. Did you talk with Gibbons or Fuhrmann at that time?

A. No. I believe the meeting was in progress in Mr. Fuhrmann's office, and I didn't go near it.

Q. I see.

A. I just picked up my tools and went on home.

Q. Did you ever have any conversation with Fuhrmann or Gibbons after that day, March 19, 1945?

A. Yes, I called Mr. Fuhrmann and asked him if we could go back to work after the strike was settled. [56]

Q. You called him after the strike was settled?

A. Yes.

Q. Approximately how long afterwards?

A. I think it was around the 6th of November.

Q. 1945? A. 1945.

Q. What conversation did you have with him?

A. I can't recall the entire conversation, but——

Q. The substance of it?

A. Well, he just told me that there wasn't a job for me there at that time, in fact, there was no job for any of us fellows that stayed out. [57]

* * *

Q. Mr. Sapp, did you have any reason for not wanting to go to work in the carpenter shop?

A. Distinctly I did.

Q. What was the reason?

(Testimony of Jesse L. Sapp.)

A. Well, in the first place, my conscience wouldn't allow me to be a scab; and in the second place, it was in direct violation of the oath I took when I joined the International Alliance, Local 44.

Q. To what oath do you refer?

A. There is an obligation in the front pages of the by-laws which refers to the constitution of the American Federation of Labor, and in that oath it states that — I think it says, "I further affirm——" I have it right here — in the middle of it, it says, "I further affirm I will observe the mandate of the American Federation of Labor——"

Mr. Mitchell: Just a moment. May we find out what he is reading from?

The Witness: The by-laws of Lodge 44.

Trial Examiner Riemer: The witness holds in his hands the constitution and by-laws of Affiliated Property Craftsmen, Local No. 44, of the International Association of Theatrical and Stage Employees and Moving Picture Operators of the United States and Canada, first edition. He is reading from page 2.

Q. (By Mr. Rissman): Perhaps you had better start reading it again.

A. Should I read the whole thing, or just a portion?

Q. Read the part you are referring to in your answer.

A. "I further affirm I will observe the mandates

(Testimony of Jesse L. Sapp.)

of the American Federation of Labor so long as the International Alliance be a part of that organization." The thing that I referred to in the American Federation of Labor, I couldn't repeat that word for word, and I haven't got one with me, but [60] it distinctly says before a member is allowed to work in the jurisdiction of a sister local he must have the consent of that local.

Q. Now, on March 19, 1945, were the carpenters working in the carpenter shop at Warner Bros.?

A. What date was that?

Q. The date of your discharge, March 19.

A. No, they were not.

Q. And do you know, or did you know at that time, why they were not working?

A. They were on a picket line out in front.

Q. Did you ever refuse at any time to do any work which you were assigned in the prop shop, or in connection with prop making during the time you were employed by Warner Bros.?

A. I never did.

Q. Prior to March 19, 1945, were you ever requested to do any work other than prop making?

A. No, sir, I never was. [61]

* * *

Cross-Examination

By Mr. Mitchell:

Q. Mr. Sapp, in the early part of March of 1945 you were a member of Local 44 of the I. A. T. S. E.?

A. I was.

(Testimony of Jesse L. Sapp.)

Q. And you were working at Warner Bros.?

A. That's right.

Q. I will show you Respondents' Exhibit 2. Will you tell [74] me in which job classification you were working?

A. As a gang boss. However, it was sub-foreman until I think this book came out and it was changed to gang boss, just the title.

Q. In this document, having become effective according to its terms as of January 1, 1944 — you were working in March, 1945, pursuant to this contract, weren't you? A. That's right.

Q. And you were working in the classification known as T-2, is that it?

A. I believe that's it,—prop——

Q. Which is prop and miniature gang boss?

A. That's right.

Q. At \$2.05 an hour? A. That's right.

Q. That was your job? A. That's right.

* * *

Q. Do you recall the first meeting that you had either with I.A.T.S.E. representative or with Warner Bros. representatives with respect to the question of crossing jurisdictional lines, or working at carpenter work?

A. Well, crossing the lines was on the second day of the strike. Mr. DuVal and Mr. Brewer, in front of the studio in the middle of the street.

Q. That was the first discussion by any I. A. T. S. E. representatives that you remember, was

(Testimony of Jesse L. Sapp.)

a discussion across the street from the studio?

A. It definitely was.

Mr. Rissman: Mr. Mitchell, may we have for this record an identification of Mr. DuVal. I think this is the first time his name has been mentioned.

Mr. Mitchell: He is business agent of Local 44.

Q. (By Mr. Mitchell): Is that right?

A. That's right.

Q. "Cappy" DuVal?

A. That is correct. [77]

Q. And Mr. Roy Brewer is the international representative of the I.A.T.S.E.?

A. That is correct.

Q. Was this conversation in a picket line?

A. No, sir, it was across the street from the picket line.

Q. Across the street from the picket line. And without naming all the people there, were the Warner Bros. prop men in general there?

A. I would say practically the whole personnel of the studio was out there that morning.

Q. The prop men, most of them?

A. Most all of the prop men.

Q. Most of the grips? A. Grips.

Q. A grip is a classification that does stage hand work, is that right?

A. That's right, Local 80.

Q. And most all of the lamp operators were there?

A. I couldn't say whether all of them were out

(Testimony of Jesse L. Sapp.)

there but a large bunch of them were out there.

Q. All right, who spoke first, Mr. Brewer or Mr. DuVal? A. I think Mr. DuVal did.

Q. What did he say?

A. He told us that he had a telegram from Mr. Walsh telling us to cross the picket line. [78]

Q. Did he read it to you A. He did.

Mr. Mitchell: I will ask that this document be marked Respondents' Exhibit 3 for identification. I have additional copies in my office which I will furnish this afternoon.

(Thereupon, the document referred to was marked as Respondents' Exhibit No. 3, for identification.)

Q. (By Mr. Mitchell): I will show you a document marked Respondents' Exhibit No. 3 and referring particularly there to a copy of a telegram dated March 12, 1945, from Mr. Walsh — Richard Walsh — to Mr. DuVal, read it and tell me whether that was the telegram that was read to you on the day in question. A. That's right, it is.

Q. And later on did you see this entire document marked Respondents' Exhibit 3?

A. I received a copy of it through the mail when I went home that evening, the second day of the strike.

Q. A copy of the entire document?

A. That's right.

Mr. Mitchell: I will offer it in evidence.

Mr. Rissman: I have no objection to it on the

(Testimony of Jesse L. Sapp.)

basis of identification. I do object to its materiality, if the examiner please.

Mr. Mitchell: I claim it is a part of proper cross-examination. He has gone into the questions. Let's finish [79] them.

Trial Examiner Riemer: The objection is overruled. It may be admitted and marked in evidence as Respondents' Exhibit 3.

(Thereupon, the document heretofore marked as Respondents' Exhibit No. 3, for identification, was received in evidence.)

Q. (By Mr. Mitchell): Who read the wire to you from Mr. Walsh? A. Mr. DuVal. [80]

* * *

Q. All right. When was the next conversation when anything was said about crossing jurisdiction or doing carpenter work?

A. The following Sunday Mr. Walsh made that statement at a meeting, during a meeting he called.

Q. Let's see. What date would that be then?

A. I believe that was the 18th.

Mr. Rissman: March 18?

Mr. Mitchell: March 18? [85]

The Witness: 18, I believe.

Mr. Rissman: 1945.

Q. (By Mr. Mitchell): Where was this meeting held?

A. At a place known as the Women's Club on Hollywood Boulevard.

(Testimony of Jesse L. Sapp.)

Q. What was it a meeting of,—I mean, what people?

A. Of the International Alliance group. I think, though, it was mostly 44, Local 44 that was called.

Q. Including others than Warner Bros.?

A. Oh yes, various studios.

Q. And you say Richard Walsh was there?

A. He was.

Q. And what did Mr. Richard Walsh say with respect to crossing jurisdictional lines or doing carpenter work?

A. He said he had made an agreement with the studios to keep the studios running, and that we were not to observe jurisdictional lines, that we were to do any work asked of us to be done, any work the Producers asked us to do. [86]

* * *

Q. All right. When was the next occasion on which any officials of the I.A.T.S.E. or any representatives of Warner Bros. made any statement with respect to crossing jurisdictional lines or doing carpenter work?

A. The following Tuesday night, at the regular meeting of Local 44.

Q. Where was that held?

A. That was in the regular hall, on Santa Monica Boulevard. I just don't recall the number.

Trial Examiner Riemer: That would be Tuesday, March 20?

The Witness: I believe that would be it.

(Testimony of Jesse L. Sapp.)

Mr. Rissman: The day after your discharge?

The Witness: That is right.

Q. (By Mr. Mitchell): Well, before we get to March 20, wasn't there some conversation on March 19? A. Oh, yes, definitely.

Q. Well, let us go from this occasion when Mr. Walsh [87] addressed you at the Women's Club on March 18. A. That is right.

Q. Let us move now to March 19, and you tell me what the first conversation was, or with whom the first conversation was had, or the first statements were made by any company representative or by any I.A.T.S.E. or Local 44 representative, with respect to crossing jurisdictional lines or doing carpenter work.

A. It was by Mr. Roy Brewer. It was definitely a statement, not a conversation.

Q. I see. And where was that statement made?

A. In the main office of the carpenter shop of the mill at Warner Bros.

Q. And who was present, in general, at that meeting?

A. I believe Mr. DuVal was there, Mr. Brewer, and a couple of other gentlemen that I don't remember who they were, were with them at that party. And all of the I.A.T.S.E. members that were working in the crafts building at that time were there.

Q. All right. Now, state what Mr. Brewer said at that time.

(Testimony of Jesse L. Sapp.)

A. I couldn't commence to repeat all he said, but the substance of it was that we was to cross jurisdictional lines and do any work they requested us to do, or we would never work in the studios again. [88]

Q. And when you say "do any work they requested us to do" did he say what the studio requested you to do?

A. He implied at least that the studio officials, or foremen there, whoever it might be.

Q. He told you you were to follow the directions of the studio officials or your direct foreman and to do whatever work they assigned you to do?

A. That is right.

Q. All right. Was anything else said at that meeting in the mill?

A. That is about all I recall. That was the main gist of the whole talk. There was nothing else that was said that I remember of particularly.

Q. In making props, did you ever enter the mill to use woodworking machinery?

A. Oh, yes. Personally, I didn't; I was directing the work, but the boys under me did.

Q. That was a regular thing, to use the woodworking machinery in the mill, wasn't it?

A. Well, whenever they wanted a large enough piece they couldn't panel with their own machinery, they had their own machinery in the prop shop as well.

Q. I see. Now when was the next statement

(Testimony of Jesse L. Sapp.)

or conversation with respect to crossing jurisdictional lines or doing carpenter work, such statement having been made either by a [89] representative of the I.A.T.S.E. or of Warner Bros.

A. About 10:30 or 11:00 the same day by Mr. Francis Fuhrmann.

Q. And where was that statement made by Mr. Fuhrmann?

A. That was in the prop shop itself.

Q. And were the members of Local 44 doing prop work present at that conversation?

A. That's right. There were 38 prop makers there.

Q. Was any representative of the I.A.T.S.E. there?

A. No, there was not.

Q. Neither Mr. DuVal nor Mr. Brewer?

A. No.

Q. What did Mr. Fuhrmann say?

A. He told us the strike was on, the carpenters were out and they had to keep the studios running and we were expected to go into the carpenter shop and take over and do the carpenter work, to build sets. He said, "Sets is what we need now and sets we are going to have and we expect you boys to go in there and build these sets."

Q. All right, did anybody say anything with respect to that?

A. I asked him if he didn't think it would be wise to ascertain the desires of the boys as to their willingness, as to whether they would or would not

(Testimony of Jesse L. Sapp.)

go into the mill. He said it would. So I turned to the boys myself and asked them how many wanted to go into the mill. [90]

Some fellow made the remark, "What the hell do you mean, want to?" I said, "All right, I'll rephrase it, then. How many will refuse to go into the mill?" And every man held his hand up. I turned to Mr. Fuhrmann and I said, "Well, Fuzzy, I think that's your answer." He said, "All right, boys, we still got plenty of prop work to do, so let's have at it," and he got up and walked out.

Q. All right. When was the next occasion when this same subject was discussed?

A. The only discussion with any official then after that of the studio was with Mr. Gibbons at a meeting we had at Jim Peck's house. That's the only conversation we had about it except out in the street, I believe, the following morning.

Q. Let's get the occasion of the next discussion either with a studio representative or with an I. A. T. S. E. representative.

A. I am speaking about me personally.

Q. Just that you know about, yes.

A. Well, there was a meeting called in Mr. Fuhrmann's office that same evening that we were fired. It was called in his office and I was excluded from that meeting.

Q. So you don't know about that of your own knowledge? A. No.

Q. When was the next meeting that you know

(Testimony of Jesse L. Sapp.)

anything about of your own knowledge, or the next discussion? [91]

A. When anyone connected with the studios was present it was with Mr. Gibbons out at Jim Peck's house.

Q. Mr. Gibbons' occupies what position at the studio?

A. Superintendent of the prop shop.

Q. He is also a member of Local 44 of the I. A. T. S. E.?

A. I believe he is.

Q. You know he is, don't you?

A. Oh, yes.

Q. Or was then?

A. Yes, I know he was. However, I had conversations with Gibbons myself the day of the strike. That wasn't at that meeting — the day we were fired, rather.

Q. Well, the last conversation that you related was the one at which Mr. Fuhrmann instructed the prop makers to do carpentry work and you called for a vote or something and then he walked out of the room?

A. That's right. [92]

* * *

A. I don't remember whether it was that afternoon or the following — the boys was called back, I believe it was the same afternoon, they called the boys back into the studio. They had a meeting over the cabinet shop where we discussed the whole matter and took a vote as to what we wanted to do and again voted unanimously to stay out.

(Testimony of Jesse L. Sapp.)

Q. Were you there? A. I was.

Q. What happened that afternoon of March 19th?

A. After that I think Mr. Fuhrmann called the meeting in his office from which I was excluded.

Q. Well, before that time did anybody request you to leave the studio?

A. No, they did not.

Q. Did they tell you your services were terminated? A. Oh, yes, definitely.

Q. Well, who said that to you?

A. Mr. Fuhrmann, when he gave me this blue slip signed by Mr. Fuhrmann.

Q. And what time of day was that? [93]

A. I'll take that back now, it wasn't Mr. Fuhrmann that handed me this. It was Mr. Gibbons that handed me this.

Q. What time of day was that?

A. 2:00 o'clock, just before we left the shift.

Q. Did he have any conversation with you at the time he handed this notice to you?

A. I don't recall just what was said when he handed it to us.

Mr. Mitchell: I'd like to have this document marked for identification.

Trial Examiner Riemer: Respondent's Exhibit 4.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 4 for identification.) [94]

(Testimony of Jesse L. Sapp.)

Trial Examiner Riemer: It may be admitted and marked in evidence as Respondent's Exhibit 4.

(The document heretofore marked Respondent's Exhibit 4 for identification was received in evidence.)

Q. (By Mr. Mitchell): Did you have any conversation with anybody later about withdrawing that off-payroll notice and coming back to work?

A. No, I did not, definitely.

Q. Did you have any conversation with any employee committee about the withdrawal of that off-payroll notice if you would come back to work?

A. No, no conversation. I have never been offered the opportunity to come back at any time since I was handed that slip under any circumstances. I might state, too, I was also refused a clearance slip. At that time you had to have an availability certificate and I was refused one and didn't have one during the whole strike and haven't received one as yet.

Q. All right then, after receiving that notice, marked Respondent's Exhibit No. 4, did you leave the studio? [95]

A. I left, yes, sir, at 2:00—at 2:30 o'clock I was out of the studio.

Q. Then was this conversation at somebody's home the next one you had with anybody connected with the I.A.T.S.E. or the studio?

A. Well, the next thing that happened was—we

(Testimony of Jesse L. Sapp.)

went back to the studio at 4:00 o'clock for this meeting.

Q. You didn't attend that meeting. What happened after that?

A. The 6:00 o'clock meeting is the one I didn't attend.

Q. You went to the 4:00 o'clock meeting?

A. Yes, among the boys themselves. Gibbons or no officials was there at all.

Q. After that meeting amongst the boys themselves, there was a meeting at 6:00 o'clock to which you weren't invited?

A. I was invited not to attend.

Q. Then what was the next meeting that you know anything about personally. Is that the one at somebody's house that Mr. Gibbons attended?

A. No, at Carpenters Hall the following day, the second day after we were fired the boys met at the Carpenters Hall amongst themselves.

Q. At the Carpenters Hall?

A. At Carpenters Hall, the only place available, and they met at Carpenters Hall. [96]

Q. The carpenters were the men that weren't working?

A. That's right, and they offered us the use of their hall if we wanted it, and we accepted.

Q. Was that meeting addressed by any representative of the I.A.T.S.E. or the studio?

A. It was not.

Q. All right, when was the next meeting when

(Testimony of Jesse L. Sapp.)

any member of the I.A.T.S.E. or representative of the I.A.T.S.E. or any representative of the studio had anything to say?

A. At Mr. Peck's house. I think Mr. Gibbons was there. He was our superintendent there and it was the first meeting, by the way, that he had attended. He contended before that he had no right to attend our meetings.

Q. That was a little meeting of the group, was it, at Mr. Peck's house?

A. That's right, it was, most of them.

Q. Well, did Mr. Gibbons represent that he was attending there as a studio representative?

Mr. Rissman: I object.

Trial Examiner Riemer: Overruled.

The Witness: No. He didn't represent that he was a representative of the studio, but he was—as a foreman, yes, and he decidedly urged the boys to go back in at that time. He reversed himself.

Q. (By Mr. Mitchell): He urged the boys to go back to work? [97] A. Yes.

Q. And to do carpenter work as instructed?

A. Oh, yes.

Q. All right. Did you have any more meetings with studio representatives or I.A.T.S.E. representatives after that?

A. No, I did not. Any more than telephone conversations it all I have ever had with any of them since then.

Q. Well, on March 19th did you tell Mr. Fuhrmann that you would not do carpentry work?

(Testimony of Jesse L. Sapp.)

A. No, we just simply took that vote that I told you about when the whole bunch was in the prop shop and they voted unanimously to refuse to go in. I didn't vote myself because I put the question to them. However, if I had have voted it would have been right with the boys.

Q. You were unwilling to do carpentry work, weren't you? A. That's right.

Q. Even though the studio representatives requested you to do so? A. Definitely.

Q. And you continued unwilling to do carpentry work at any time during that strike, didn't you?

A. That's right.

Trial Examiner Riemer: Gentlemen, I will declare a five-minute recess. [98]

* * *

Trial Examiner Riemer: The hearing will be in order. Gentlemen, will it be satisfactory if the reporter reads the stipulation now that was dictated during the off-the-record discussion?

Mr. Mitchell: Yes.

Mr. Luddy: Yes.

Trial Examiner Riemer: Will you read that back, Mr. Reporter?

The Reporter: "Mr. Mitchell: I offer to stipulate that under sentence dated the 31st day of May, 1946, and served upon the 14th day of June, 1946, the following persons were expelled from the I.A.T.S.E.: Robert W. Ames, Carl H. Gidlund, Erwin P. Hentschel, Leo L. Lamb, Raymond M.

(Testimony of Jesse L. Sapp.)

Lora, Eugene V. H. Mailes, Jesse L. Sapp, George J. Stoica, Jr.; and that the following persons were suspended for a period of six months starting June 17th, 1946: Lynn G. Batchelder and George M. Hand; and that on June 14, 1946, respondents were advised by the I.A.T.S.E. of such suspensions and expulsions."

Trial Examiner Riemer: Is that stipulation satisfactory?

Mr. Rissman: Yes, I will so stipulate.

Mr. Luddy: So stipulated.

Mr. Mitchell: So stipulated. [112]

* * *

Q. (By Mr. Mitchell): In the practice of Local 44, did your men out of employment have a practice of registering with the local?

A. Why, I understand they have a call book, yes. [121]

Q. That is what you call a call book?

A. Yes, that is right, that they sign.

Q. Did you sign the Local 44 call book?

A. I did it one time, yes.

Q. When?

A. I will have to refer to my note again. I think I have that. 10:10 a.m., November 9, I signed the call book. [122]

* * *

WILLIAM G. WHITE

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your full name?

A. William G. White.

Q. Mr. White, were you employed at Warner Bros.?

A. Yes, I was.

Q. Are you also known among the men there as Gus White?

A. Yes, sir; I am.

Q. How long were you employed at Warner Bros.?

A. About nine and one-half years.

Q. Up until when?

A. Until the 19th day of March, 1945.

Q. And what was your last occupation at Warner Bros.?

[123]

A. I was foreman in charge of the prop shop on the morning shift.

[124]

* * *

Q. (By Mr. Rissman): At the time of the termination of your employment on March 19, 1945, were you a member of any labor [125] organization?

A. I was.

Q. Which one?

A. Local 44, I.A.T.S.E.

Q. And how long had you been a member of that local?

(Testimony of William G. White.)

A. Since the beginning of the local. It was taken over from 37 and changed to 44.

Q. How long were you a member of Local 37, I.A.T.S.E.? A. Since January, 1936.

Q. And was January, 1936, the first time you became a member of any local of the I.A.T.S.E.?

A. Yes.

* * *

Q. (By Mr. Rissman): Directing your attention to March 12, 1945, did you work on that day?

A. Monday, March 12? No, I did not. [126]

Q. Was there any reason why you didn't go to work on that day?

A. There was a picket line in front of the studio, and that day I did not go through the picket line.

Q. To what work did you return on March 14, 1945?

A. To my regular work as foreman of the prop shop.

Q. How long did you continue to do your regular work in the prop shop after returning to work on March 14, 1945?

A. Until 2:30 p.m. on the afternoon of March 19.

Q. Where is the prop shop located on the Warner Bros. lot?

A. They have a crafts building which—our prop shop is located about midway of the crafts building, the carpenter shop on one side and the plastic shop on the other side. We had two shops. There was one at this location, and then there was a plastic

(Testimony of William G. White.)

shop and a plumbing shop, like between one shop and the other shop, what we called the cabinet shop. That is where we done all the cabinet work and furniture repairs and pattern making, and stuff like that.

Q. Now, this cabinet shop is considered part of the prop making department, is it? A. Yes.

Q. In which shop of the prop making department did you work? A. Both places.

Q. And where is the carpenter shop or mill with relation to the prop making shop? [127]

A. It adjoins the prop making shop, just a wall between the two.

Q. During the time that you were employed at Warner Bros., were you ever engaged in the setting up of props? A. Setting up of props?

Q. Yes. A. Yes.

Q. And in the making of props?

A. Yes, that is right.

Q. Did you ever engage in the operating of props? A. Yes.

Q. And the striking of props?

A. Yes, that is right.

Q. Will you tell us what each one of those functions or jobs is, starting first with the making?

A. The making of props—well, a prop consists of anything that is used in the inside of a set, or in a movable prop or any operating prop or any miniature or any process body. We built all those in our shop.

(Testimony of William G. White.)

Q. Regardless of the type of material used?

A. That is right.

Q. What is the setting up of props?

A. Well, if it is to be in on the stage where it was to be shot, or out on the lot, out on the location, we would build it in the shop so that it could be moved and set up in operating [128] position on the location, on the stage, wherever that is. That is what we call the setting up of the prop.

Q. By whom is the setting up of props usually done?

A. By the prop shop, the prop makers.

Q. Will you describe what is meant by the operating of props, and give us some examples of that type of thing?

A. The operating of a prop is any prop that is movable, like breakaways, the operating of a process body, or a train, a miniature train, or any prop that has anything moving on it that has to be operated.

Q. You have used the term "process bodies" a couple of times. What do you mean by that?

A. Process bodies would be bodies of airplanes or anything that is used in front of the screen in a projection job.

Q. What is meant by the term "striking props"?

A. When a prop has been shot and we have orders to strike that prop and store it away for future use, we would go in and disassemble it.

Q. Is the striking the disassembling?

A. Yes.

(Testimony of William G. White.)

Q. And storing away?

A. And storing away.

Q. During the time that you were employed by Warner Bros., did you ever work under the supervision of any one other than Mr. Gibbons? [129]

A. No.

Q. Were you ever employed as an employee of the carpenter shop? A. No.

Q. Directing your attention to March 19, 1945, did you work on that day? A. Yes.

Q. And what kind of work did you do then?

A. My regular work is foreman of the prop shop.

Q. And on what shift was that?

A. The morning shift.

Q. Was that the shift that ended at 2:00 p.m.?

A. 2:30 I believe at that time. We were going to work at 7:00 o'clock.

Q. Did you have any conversation or hear any statement on that day by Mr. Fuhrmann?

A. I did. I talked to Mr. Fuhrmann just after we had been ordered into the carpenter shop.

Q. By whom?

A. By Mr. Fuhrmann to hear Mr. Brewer to make his statement.

Q. Now you say you were ordered to the carpenter shop by Mr. Fuhrmann. Tell us what he said and where it was and to whom he said it; that is, Mr. Fuhrmann.

A. Mr. Fuhrmann, he came in and told me to

(Testimony of William G. White.)

gather my whole [130] crew and tell them to come into the carpenter shop. That was, I think, about 10:30—10:00 or 10:30, something like that.

Q. Did he tell you why he wanted them to come into the carpenter shop? A. No.

Q. Did you get your crew into the carpenter shop? A. I did.

Q. Approximately how many men were there in your crew about that time?

A. Around 38 or 40, I think about 38.

Q. And when you got into the carpenter shop who was there?

A. Just a few minutes after we all got in there, Mr. Brewer and Cappy DuVal and Mr. Fuhrmann came through the front door.

Q. What happened then?

A. And Mr. Brewer made a talk and told us Mr. Walsh had told the studios he would keep the studios running during that trouble and that we was to do anything that the Producers asked us to do.

Q. Was Mr. Fuhrmann present during this talk by Mr. Brewer? A. He was.

Q. Was anything else said by anyone at that time and place?

A. I'm not sure about that. It seems to me that Mr. DuVal did say a few words, but I don't remember for sure. [131]

Q. Now you say you had a conversation with Mr. Fuhrmann shortly after he ordered you to bring your men into the carpenter shop? Tell us about that.

(Testimony of William G. White.)

A. After Mr. Brewer made his talk, Mr. Fuhrmann came over to me and asked me how the boys felt about it and I told him that the way I understood they felt from what I had heard, that they would not go in the carpenter shop as carpenters. He says, "Will they take their blue slips in preference to going in as carpenters?" I says, "I think that's the way you will find it." He says, "That's the way it will be."

Q. What did you understand him to mean by taking their blue slips? [132]

* * *

The Witness: I understood him to mean that they would take their blue ships as a discharge slip, which it was, and everybody understood that. A blue slip at Warner Bros. was a discharge slip.

Q. (By Mr. Rissman): You say everybody understood that. Will you explain how that was understood, how you understood it?

A. The reason I understood it was from hearing the boys talk and from them talking to me and me talking to them.

Q. Now during the time that you were a foreman or assistant foreman, whatever your job was out there, had there ever been any men in the prop making department laid off because of lack of work?

A. Plenty of times.

Q. And how are employees notified of any such layoff because of lack of work?

A. Because of lack of work in the afternoons be-

(Testimony of William G. White.)

fore the quitting hour I would tell each gang boss about how many men that we thought that we could use the next day and those men we did not have work for were notified that they were off, on call.

Q. How would they be notified that they would be off, on call?

A. Through the foreman they were working under or through [133] myself.

Q. That is, they would be notified verbally?

A. Verbally.

Q. And did you or anyone under your supervision ever have occasion to hand any employee a blue slip?

A. I have.

Q. And what occasions did you hand employees blue slips?

A. It was on occasions where an employee was, we figured was not competent to do the work or could not do the work or would not do the work and he was discharged for a reason.

Q. Is there any other kind of notification when an employee is discharged for a reason?

A. No.

Q. And when you were referring to blue slips, you were referring to one similar to Respondent's Exhibit 4 which I now hand you?

A. That's right.

Q. By whom are these blue slips normally signed?

A. Mr. Fuzzy Fuhrmann.

Q. Did you get a blue slip on March 19th?

A. I did.

(Testimony of William G. White.)

Q. Do you have it with you? A. Yes, sir.

Mr. Rissman: Mr. Mitchell, can we stipulate that the blue slip handed to Mr. White is identical with Respondent's [134] Exhibit 4 except for the difference in name and number of employee and his rate of pay?

Mr. Mitchell: And his occupation.

Mr. Rissman: And occupation; that the reason or remarks: "Refused to do carpenter work" is the same?

Mr. Mitchell: Yes, that's right. I will so stipulate. [135]

* * *

Q. How did you happen to be meeting on the Warner Bros. lot on that day, Wednesday, March 21st, 1945?

A. About 9:00 o'clock of that morning Mr. Fuhrmann called me and asked me if I would come to his office.

Q. Called you at your home?

A. At my home.

Q. What did you tell him?

A. I asked him if any other boys would be there. He says, "Yes, Carl Gidlund and Harold Horner."

Q. Who is Harold Horner?

A. Harold Horner was a pattern maker in our cabinet shop. I went in about 9:30 and Mr. Fuhrmann asked us if——

Q. Were Horner and Gidlund with you?

(Testimony of William G. White.)

A. Yes.

Q. All right, tell us what was said.

A. He asked me if there had been any change in the way the boys felt and I told him that there had not been. He asked me, would I call a meeting in the studio lot that afternoon and ask them to go over it again, and I told him I would. I got on his telephone and called I think all of the men that was out.

Q. And approximately how many came to that meeting that afternoon?

A. I think they were all there—about 38. [142]

Q. Where was the meeting held?

A. Over the cabinet shop. We have a galley up there, a mezzanine floor. It was up there.

Q. Who was present in addition to the prop making department employees?

A. No one at that meeting.

Q. Was Mr. Fuhrmann present?

A. No, sir.

Q. What occurred at that meeting?

A. Everything was talked over and they decided they would still not go back as carpenters.

Q. Did they have any further conversation with Mr. Fuhrmann after that meeting?

A. Called Mr. Fuhrmann and told him that the boys refused to go in as carpenters, but was perfectly willing to do their own work as prop makers.

Q. Was there any further meeting of the prop making department employees concerning that same question?

(Testimony of William G. White.)

A. The next day, which was Thursday, Jim Peck, who was one of my foremen there in the shop, called me about 9:00 o'clock in the morning and asked me would I come to his home.

Q. Was there any meeting after the one above cabinet shop, and before the one at Jim Peck's home? A. No.

Q. When was the meeting in the Carpenters Hall? [143]

A. That was on a Tuesday, the way I remember it.

Q. What happened at the meeting at Carpenters Hall? Who was present?

A. Well, I think the whole same bunch of men were present.

Q. And what was the discussion?

A. The same subject was discussed, and the same conclusions arrived at, that we would not go back as carpenters. [144]

* * *

Q. After March 19, 1945, did you ever make application for your old job at Warner Bros.?

A. I did.

Q. Approximately when did you make the application?

A. On the 6th day of November, I think.

Q. 1945? A. 1945.

Q. And how did you make such application?

A. I called Mr. Gibbons over the telephone and asked him about returning to my old job, and he

(Testimony of William G. White.)

told me that it was entirely out of his control, it was up to Mr. Fuhrmann.

Q. Did you then communicate with Mr. Fuhrmann? A. I did.

Q. Did you see him personally or talk to him on the phone?

A. No, I talked to him over the telephone.

Q. On the same day.

A. On the same day. I fact, I hung right up and made the other call.

Q. What conversation did you have with Mr. Fuhrmann?

A. I asked Mr. Fuhrmann if I could return to my old job, [148] and he said that I could not.

Q. Did you have any further conversation with Mr. Fuhrmann about it?

A. As I remember, why, he said that I would have to see Mr. DuVal or Mr. Brewer.

Q. On March 19, 1945, you were a member of Local 44, is that right? A. Yes.

Q. And were you a member of Local 44 at the time that the strike ended October 31, 1945?

A. Yes.

Q. Were you a member on November 7, 1945?

A. Yes.

Q. Are you a member now? A. Yes.

Q. Has there ever been any time since January, 1936, when you have not been a member of I.A.T.S.E., either Local 37 or Local 44 of that union? A. There has not.

Q. The answer filed by the companies in this

(Testimony of William G. White.)

case says, with respect to you, that on November 18, 1945, you made application to respondent Warner Bros.—which is the company—for employment; that respondent Warner refused to employ you by reason of the fact that no vacancies existed in your job classification which you were qualified to fill. Were you ever [149] told that by anybody connected with Warner Bros.?

A. I was not. I wrote them a letter asking them for a job, but I never did receive an answer to that letter.

Q. Did you have any conversation with anyone, any official or representative of the I.A.T.S.E., after your conversation with Mr. Fuhrmann on November 7 or November 8, 1945?

A. I had no conversation with anyone after November 7th.

Q. Are you working now? A. No.

Q. Directing your attention to March 27, 1945, did you attend any meeting of the I.A.T.S.E., Local 44? A. 27th.

Q. That would be not quite a week after you were notified that you were off the payroll?

A. I did not attend that meeting, no.

Mr. Rissman: That is all.

Cross-Examination

By Mr. Mitchell:

Q. In your capacity as foreman, you say, of the prop shop, you worked with your hands?

(Testimony of William G. White.)

A. No.

Q. Referring to Respondents' Exhibit No. 2, is your job classification the first one here, called T-1, prop and miniature foreman, at \$118.03 a week?

A. That is right. [150]

* * *

Q. (By Mr. Mitchell): Well now, you have testified about a lot of things here, and the questions were so asked that they didn't line up in order. Let us start at the beginning of these meetings with either the Warner Bros. people or the I.A.T.S.E. people, with respect to crossing jurisdictional lines or doing work in the carpenter shop. When did the first meeting occur, or the first discussion with either I.A.T.S.E. people or company people that you know anything about, and where? [151]

A. The first meeting that I know anything about was the Sunday meeting that Mr. Walsh called at the Woman's Club down on Hollywood Boulevard.

Q. And at that meeting what did Mr. Walsh tell you?

A. He told us that he had told the studios that he would keep them running during this trouble, and he expected us to go in and do anything that the producers asked us to do. [152]

* * *

Q. Now, where was the next meeting when a company or I.A.T. representative, talked about the jurisdictional lines?

(Testimony of William G. White.)

A. That was on Monday morning after the Sunday meeting at the Woman's Club.

Q. And that would be what date?

A. The 19th.

Q. The 19th of March? [153] A. Yes.

Q. Where was that meeting?

A. That was in the carpenter shop at Warner Bros.

Q. The prop makers were present?

A. They were.

Q. As well as other craft people? A. Yes.

Q. And who spoke at that meeting?

A. Mr. Brewer.

Q. Mr. Brewer? A. Mr. Roy Brewer.

Q. What did he tell you?

A. Practically the same thing as Mr. Walsh had told us the day before, that we was to do anything the producers asked us to do.

Q. Did he read you a telegram from Mr. Walsh?

A. I believe he did.

Q. I will show you Respondents' Exhibit No. 3 and ask you if he read you the wire dated March 12, signed by Richard Walsh?

A. I think he did. I think that is the one he read us.

Q. And referring to that, did you receive a copy of Respondents' Exhibit 3? A. I did.

Q. Through the mail? [154] A. I did.

Q. That same day or thereabouts?

(Testimony of William G. White.)

A. Tuesday afternoon. It was at home when I got home. It came that afternoon in the mail.

Q. All right. Now, when was the next meeting or conversation with any company or I.A. representative when crossing jurisdiction was discussed?

A. It was right after the meeting when Mr. Roy Brewer spoke.

Q. Where was that discussion?

A. That was in the carpenter shop.

Q. Who was present?

A. Mr. Fuhrmann came to me and asked me how the boys felt about working in the carpenter shop, and I told him that from what I had heard them say, that they would refuse. He asked me if they would take their blue slips in preference to going in as carpenters. I said, "That is the way I understand it." He said, "Yes, that is the way it will be."

Q. All right. Now, when was the next discussion?

A. Just after lunch, around 12:00 or 12:30.

Q. On what date?

A. On the 19th, a Monday.

Q. Where was that discussion?

A. That was in the prop shop. [155]

Q. Who was present? A. Mr. Fuhrmann.

Q. And the members of the prop shop?

A. Yes. He asked me to call the men all together into the prop shop, which I did.

Q. All right, what was said?

A. He told the boys that they had to keep the

(Testimony of William G. White.)

studios running, that he needed sets more than he needed props, that we were to go into the carpenter shop next morning at 7:00 o'clock and build those sets.

Q. What else occurred?

A. And Mr. Sapp spoke up and said, "Don't you think it's about time we found out how the boys feel about it?" He said, "Yes," he did, and Mr. Sapp asked the boys how many would go to work in the carpenter shop and somebody spoke up and made some merark and Mr. Sapp changed the question and said, "How many will refuse to go in?" And every man refused.

Q. Did Mr. Fuhrmann tell the boys there that he would have no use for making props unless he could get some sets made?

A. He did not. He said he needed sets more than he did props and therefore we would build the sets.

Q. All right, did anything else occur there?

A. After this the boys told them they would not work as carpenters. He says, "O.K., boys, there is plenty of prop work." He says, "Let's get back to it," or something to that effect. I don't know the exact works, and he left and [156] went back to his office.

Q. All right, and what happened next?

A. About 2:00 o'clock Mr. Gibbons came around with the blue slips and told us we were all off.

Q. What happened next?

(Testimony of William G. White.)

A. We took our blue slips and then walked out the front gate. [157]

* * *

Q. Have you been working since March 19th?

A. Not in the studios.

Q. Where have you been working?

A. On some outside work.

Q. What outside work?

A. Oh, I worked down in Hollywood on a night club.

Q. Carpenter work? A. Cabinet work.

Q. What do you mean by cabinet work?

A. Installing fixtures, cabinets, in a night club.

Q. Isn't that carpenter work?

A. Well, there seems to be a difference in the two works.

Q. Whom were you working for on that night club?

A. Working for Mr. Sapp—the Yalta Restaurant Company.

Q. Have you worked anywhere else?

A. Oh, on a couple of days' work, one place and another.

Q. You mean a couple of days at a time?

A. Yes. [163]

Q. No other longer work? A. No.

Q. Did you make any effort to get work?

A. Huh?

Q. Did you make any effort to get work?

A. I worked when I wanted to work.

(Testimony of William G. White.)

Q. You were able to work whenever you wanted to work, weren't you? A. That's right.

Q. I mean there is plenty of carpenter and cabinet work in this town if you want to work?

A. Probably so, but I haven't got a carpenter's card.

Q. Well, there is plenty of carpenter and cabinet work in this town without a carpenter's card, isn't there? A. I don't work without a card.

* * *

Q. (By Mr. Mitchell): I asked you, Mr. White, about working for others since March 19. Have you worked for yourself on any project? Do you own a piece of property of some sort? A. Yes.

Q. What kind of a piece of property? [164]

A. I own a piece of property out in North Ridge.

A. A farm?

A. Well, a small walnut ranch.

Q. Have you spent your time working there?

A. Part of it.

Q. How many acres?

A. Well, I have about an acre and a half?

Q. Is that where you live? A. No.

Mr. Mitchell: That is all.

Trial Examiner Riemer: Mr. Luddy?

Q. (By Mr. Luddy): How many years did you work in the studios, Mr. White, without a card?

Mr. Rissman: I object.

Trial Examiner Riemer: Overruled.

(Testimony of William G. White.)

The Witness: Well, since 1923 to about 1929, and from about 1931 to 1936.

Q. (By Mr. Luddy): This work you were doing building cabinets and putting in show cases in this night club, does that fall within the jurisdiction of the Carpenters in the Building Trades Council?

A. It does. [165]

* * *

Q. I show you what purports to be a photostatic copy of a letter, and ask you if that isn't the letter that Mr. DuVal read to your group there at that meeting at 6:30 on the evening of the 19th of March?

A. I think that that was what he read.

Mr. Luddy: I ask that this be received in evidence. It has heretofore been marked for identification, I think. No, it hasn't been identified.

(Thereupon the document above referred to was marked I.A.T.S.E.'s Exhibit No. 1 for identification.) [167]

* * *

Redirect Examination

By Mr. Rissman:

Q. Mr. White, you testified that on March 12 and March 13 you did not go to work?

A. That is right.

Q. Is that right? A. Yes.

Q. Now, did you ever refuse to do any work in the prop making department? A. I did not.

Q. When you went back on March 14 and at that

(Testimony of William G. White.)

time up until you received the blue slip on March 19, did you ever refuse to do any work in the prop making department? A. I did not.

Q. Did you have any reason for refusing to work in the carpenter shop?

A. I had plenty of reasons. [168]

Q. What were your reasons?

A. I could not see my way to be a scab, which I would have been if I had worked in the carpenter shop, if I had went in the carpenter shop to work. Also, I took the same obligation Mr. Sapp took when I became a member of Local 44.

Q. After March 19, 1945, and down to the present time, have you been ready and willing to accept immediate employment or re-employment on your former job in the prop shop of Warner Bros.?

A. I have.

Q. Are you willing to accept such reinstatement now? A. I am.

Trial Examiner Riemer: Are there any further questions?

Mr. Rissman: That is all.

Mr. Luddy: Yes, I have a question.

Trial Examiner Riemer: Mr. Mitchell?

Mr. Mitchell: Nothing further.

Trial Examiner Riemer: Mr. Luddy?

Recross-Examination

By Mr. Luddy:

Q. You knew that the International president of your labor organization had advised you and the

(Testimony of William G. White.)

Trial Examiner Riemer: Sustained. [171]

Q. (By Mr. Luddy): You considered that if you obeyed the orders of the International president of your organization under the circumstances which you have stated in response to my questions, that by so doing you would be a scab, did you?

A. That is right.

Mr. Luddy: That is all.

Trial Examiner Riemer: Mr. White, before March 12, 1945, at Warner Bros. Studios what work did the carpenters do in the mill or carpenter shop, as distinguished from the work that you did in the prop shop? What was the difference between the work?

The Witness: The carpenters built the sets. In other words, to illustrate that, this room is a set. The carpenters built the walls, the ceiling, and the floor. Everything in this room, this desk, those chairs, all that is props. We built those props. They were not allowed to build anything that is a prop is a set unless it was—in fact, I think I have heard some officials of the I.A. define a prop as anything that is not a part of the walls or the ceiling.

Trial Examiner Riemer: Or the floor?

The Witness: Or the floor. Anything that is not connected as a part of that wall, ceiling, or the floor is a prop.

Trial Examiner Riemer: Can you state as a matter of your own knowledge what work you would

(Testimony of William G. White.)

have performed, what [172] work you would have done had you worked in the carpenter shop on and after March 19th, 1945?

The Witness: We would have built those sets, built the walls, the floors, the ceilings, or any other part of that set that the carpenters had done, had been doing for years which we have never done. [173]

* * *

Mr. Mitchell: Mr. Examiner, in preparing the answer to the amended complaint, there were certain clerical errors made, and by inadvertence a paragraph was left out which had been included in the answer to the original consolidated complaint. So that these errors may be corrected I will ask [174] counsel for the Board to stipulate, first, that the answer to the amended complaint may be amended on page 6 in the sixth line by striking out the words, "J. C. Goudie and Chas. J. Larsen." Is that agreeable, Mr. Rissman?

Mr. Rissman: I have no objections to your amendment to the answer as you propose it.

Mr. Mitchell: Is that agreeable to the Examiner?

Trial Examiner Riemer: It is agreeable to me. So that now the proposed amendment in which there is no objection is to strike from paragraph 12, subdivision a, of respondents' answer, the two names J. C. Goudie and Chas. J. Larsen. Is that correct?

Mr. Mitchell: That is correct, sir.

Mr. Rissman: No objection.

Trial Examiner Riemer: The stipulation is accepted, and it is so corrected. [175]

* * *

GEORGE STOICA, JR.

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. George Stoica, Jr.

Q. Mr. Stoica, were you ever employed at Warner Bros? A. I was.

Q. When were you employed there?

A. I started in at Warner Bros. in February, 1929.

Q. And how long did you work there?

A. Up to March 19th, 1945.

Q. And what kind of work did you do at Warner Bros.?

A. I started in the property department, worked there for a few months—[177]

Q. What kind of work did you do in the property department?

A. Hauling furniture around, and books, and other props, dressing sets, or helping with dress sets.

Q. What else did you do there at Warner Bros.?

(Testimony of George Stoica, Jr.)

A. I then transferred to the location department, where I done office work and kept records. I then went into the production office, where I made out daily schedules and other office work. From there I went into the sound department, where I worked for approximately two years on wax recordings, and there for a period of about three months I was out of work, and I managed to get back in at Warner Bros. on a labor gang, where I worked until I got into the prop shop, and I went into a little place under a stairway there where they had a few doorknobs in place, and I started building that department up, which later became known as the hardware department, a part of the prop shop, but a separate shop, and I worked, built that up, and worked there up to the day that I was fired.

Q. How long did you work in this place that you call the hardware shop?

A. About 11 or 12 years.

Q. Can you describe the nature of your work in this hardware shop, what your responsibilities and duties were?

A. Well, we made, with the exception of the cheap cast hardware, we made all the door locks, bronze door locks, door [178] knobs, railroad hardware, ship hardware, push bars, panic bolts, every grill, door checks, plates, every type of hardware, made all the lettered signs. We had a stock of letters of all sizes and characters. We made up

(Testimony of George Stoica, Jr.)

the signs and after they were shot we took the letters off.

Q. You say after they were "shot." What do you mean by that?

A. After they appeared before the camera. We made patterns, metal patterns, had them cast, machined them, filed them, done all metal work.

Q. During all of that period did you ever do any carpenter work? A. No, sir, I never have.

Q. Have you ever built any sets?

A. No, sir.

Q. Under whose supervision were you working during that entire period in the hardware shop?

A. That was a very strange setup. I was supposed to be under the prop shop, and therefore under the supervision of Jimmy Gibbons and Mr. White.

Q. Referring to William White who just testified? A. That's right.

Q. You say you were supposed to be under their supervision. Were you?

A. None of them ever came in there during the time I was there, or ever bothered or showed any other interest in it. [179] I practically run the thing myself.

Q. Who was your boss, if anyone?

A. The only one that I ever answered to was F. T. Fuhrmann, Fuzzy Fuhrmann. The only time I had anything to do with him was when he threatened to fire me several times.

(Testimony of George Stoica, Jr.)

Q. Mr. Fuhrmann? A. That's right.

Q. Now, did you go to work on March 12, 1945?

A. I did not.

Q. Why didn't you go to work on that day?

A. There was a picket line in front of Warner Bros., and I couldn't get the clear picture of what we were supposed to do, or weren't supposed to do. There was a lot of confusion, so I went home.

Q. Were you asked to go through the picket line and go to work at any time after March 12, 1945?

A. No, I don't believe I was asked. We got together——

Q. You say "we"?

A. Most of the fellows that are in this room and the fellows that went back, in other words, the prop shop group. I remember out in front of Warner Bros., I believe it was, they had received some telegram or some letter or something telling them to ignore the picket line, to go in and do their work.

Q. Do you recall what day that was, keeping in mind that the strike started on March 12th, on Monday? [180]

A. I believe it was the next day, and they decided that they would go in to work Wednesday morning.

Q. Did you go to work on Wednesday morning?

A. I did.

* * *

Q. Now, did you continue to work in the hardware department until March 19? A. I did.

(Testimony of George Stoica, Jr.)

Q. And did you work on March 19?

A. I did, up to about 1:45.

Q. What happened at 1:45?

A. At 1:45 I left to keep an appointment with a dentist to have two teeth removed.

Q. Did you get your blue slip on March 19?

A. I did.

Q. At what time?

A. Approximately 7:00 o'clock that evening.

* * *

Q. (By Mr. Rissman): Was Charles Jensen employed in the prop shop at Warners?

A. He was.

Q. And you say he was employed as a cabinet maker? A. That is right.

Q. Did you see him at these two meetings you have already testified about?

Mr. Mitchell: Which two? He has testified to three so far.

Trial Examiner Riemer: No.

Mr. Mitchell: I beg your pardon.

Mr. Rissman: Two meetings.

Mr. Mitchell: He testified to one addressed by Walsh at the Women's Club, one addressed by Brewer on March 19, and one at noon on March 19.

Mr. Rissman: You are right, Mr. Mitchell.

Q. (By Mr. Rissman): I am talking about the two meetings in [187] the shop.

A. That is what I figured. I can't remember having seen any particular fellow or not. I know

(Testimony of George Stoica, Jr.)

that Jesse was there, and Gus. There was a continuous milling around and talking one to the other.

Q. Well, did you go to work at any time after March 19, 1945, at Warner Bros.?

A. No, sir; I did not.

Q. On March 19, 1945, were you a member of Local 44? A. I was.

Q. How long have you been a member of Local 44, I.A.T.S.E.?

A. I was a member of Local 37, and I went into 37 in 1936; and in 1939 when it was dissolved and Local 44 was created, I became a member of Local 44.

Q. And how long did you remain a member of Local 44?

A. Up to the day that I received notification of my expulsion, on June 14, 1946.

Q. Prior to June 14, 1946, and back to 1936, when you first became a member of any local of the I.A.T.S.E., was there ever any time that you were not in good standing in the I.A.T.S.E.?

Mr. Mitchell: Wait a minute. I object to that on the ground it calls for his conclusion.

Trial Examiner Riemer: Overruled.

The Witness: Will you read that, please?

Trial Examiner Riemer: Read the question.

(The question was read.)

The Witness: No, sir, there never was.

Q. (By Mr. Rissman): After the strike was terminated, did you attempt to get your job back at Warner Bros.?

(Testimony of George Stoica, Jr.)

A. Yes, I did. After the strike was terminated, and also before.

Q. Well, before the strike was terminated what efforts did you make in that respect, and when?

A. Well, I knew that Mr. Fuhrmann had coffee across the street at a drug store every morning at 9:30, so I made it my business to run into him accidentally several times. And each time I asked him if there was any possibility of my getting back to my job, and he informed me very clearly that unless I agreed to go into the carpenter shop that I couldn't work at Warner Bros. again. Then——

Q. Do you recall approximately when you met him in this drug store or coffee shop?

A. No, I couldn't.

Q. When the strike was terminated, did you have any conversation with any Warner Bros. official with respect to returning to work there?

A. Yes, I had called up Mr. Fuhrmann.

Q. When? To what are you going to refer there?

A. It is a note that I made on a piece of paper alongside the phone on November 10, the night that I called him. [189]

Q. And the piece of paper that you now have is the note you made at the time you made the telephone call?

A. That is right.

Q. All right. Tell us what conversation you had with Mr. Fuhrmann on November 10, 1945.

A. Do you want me to read this, or just——

Q. Just give us your testimony after you have refreshed your recollection from that note.

(Testimony of George Stoica, Jr.)

A. I told him that Barney, that I heard that Barney was called into work.

Q. Who is Barney?

A. Barney is the afternoon man in the hardware room, the hardware department. And I told him I had been away from home, and I wanted to know if there was a call for me, and he said no. He said, "You sign the call book." He said, "If we need any prop makers, we will call the local." I said, "How about hardware men?" He said, "I have got one coming in." And I told him that because of the freeze that had been declared over the motion picture industry, that the only job I could go back to was the job that I held on March 19, and that the only place they could send me is back to my old job. He said, "We have all the help we need." It so happened I had signed the call book on November 9th at 10:30 in the morning, and Barney Allsdorf had never signed the call book, yet Barney was called in to go to work, and I wasn't. [190]

Q. Is Barney Allsdorf you refer to the Barney that was referred to as being the afternoon man?

A. That is right.

Q. Where did you sign this call book?

A. In the call office of Local 44.

Q. Who is Tinny Wright?

A. Tinny Wright is the production manager of Warner Bros.

Q. Did you have any conversation with him on or about October 31, 1945?

(Testimony of George Stoica, Jr.)

A. I did, when the —

Q. Where did it take place?

A. I was standing in the time office at Warner Bros., and I called him on the phone at his office.

Q. What conversation did you have with him?

A. I told him that we had been waiting around all afternoon to go back, to go to our jobs, that everyone else had gone in to work and that we had tried to get in touch with Carroll Sachs, and they kept telling us that he was in conference and couldn't be reached. And I asked him if he couldn't please go down there and find out just where we stood. A short time later I saw him driving out, and he saw me and he stopped the car and said that Mr. Sachs was very busy, but had promised that he would straighten us out the first chance he had.

Q. Did you ever have any conversation with Carroll Sachs with respect to your request to return to work?

A. Yes. At one time I went to the front entrance at Warner Bros.

Q. When was this, approximately?

A. It was shortly before we filed the charges with the National Labor Relations Board. I have been trying to find some record of the date, and I can't. I know we had gotten together and decided we would take action under the N.L.R.B. Act, and before we took that action I wanted to see if there wasn't any possibility of settling this thing without going to that extreme. I called Mr. Sachs' office

(Testimony of George Stoica, Jr.)

from the entrance, and he notified the officer to let me in. I went directly to his office and went in, and Art Shafer, his secretary, was seated across the desk from him, and Mr. Sachs was very nice. He asked me what he could do for me, and I told him the things that I said a moment ago, that my reason for being there was to see if we could make any settlement or get our jobs back without casting any more reflection on Warner Bros. He told me that it would be unfair to give us our jobs back or pay us for the time we had lost, it would be unfair to the men who had co-operated with the studio and gone in and done carpenter work. I thanked him, I told him if that was his answer that there was nothing for us to do but to file those charges. He told me not to be in such a hurry. He said, [192] "Sit down for a while and we will talk this over." And he wanted to know our reason or my reason for refusing to do carpenter work. He said, "Didn't you feel you owed the company some loyalty?" And I told him that I didn't feel I owed the company anything, that if I hadn't given a little bit more than they had paid for I wouldn't have worked there 16 hours in stead of 16 years. And I asked him where the company's loyalty was to the men who had worked there for them and built the studio up where it was, that I had seen no sign of it. And Art Shafer asked me why I didn't run for council again. And Mr. Sachs took it up and he said, "Why, that was very silly for you to do what you did."

(Testimony of George Stoica, Jr.)

He said, "Do you realize it is going to cost you votes?" I said, "I can't see that. I can't see where refusing to scab will cost me anything." We had quite a conversation. [193]

* * *

Q. (By Mr. Rissman): Some time in the latter part of January, 1946? A. That's right.

Q. All right, and what conversation did you have with Mr. Brewer with respect to your re-employment at Warner Bros.?

Mr. Mitchell: Objected to as being immaterial. Mr. Brewer is not a representative of Warner Bros.

Mr. Rissman: If the Examiner please——

Trial Examiner Riemer: I have been waiting for an objection of this type for a long time. There has already crept into the record a lot of conversations between the complainants here and members of the union in the absence of any of the respondents' officials. Now no objection has been made heretofore——

Mr. Mitchell: I have been trying to be reasonably co-operative, but when you get off into who were re-employing people for Warner Bros., that gets a little bit out of bounds so far as we are concerned. We will do our own employing.

Mr. Rissman: I think Mr. Mitchell argued that the offer, when the last witness was on the stand, of a job or if there was an offer of a job to him by the union, it was material and part of respondents' case.

Trial Examiner Riemer: Do you offer this testi-

(Testimony of George Stoica, Jr.)

mony or [196] propose to offer it as binding on the respondent, what Mr. Brewer may or may not have said to the witness? I don't see how you could do that.

Mr. Rissman: I offer this testimony with respect to the respondents—or the intervenor's position as to why the men were not employed.

Mr. Mitchell: I don't care what Mr. Brewer says as to why they weren't employed. It's what Warner Bros. says as the reason why they weren't employed.

Trial Examiner Riemer: Overruled. Do you remember the question?

Mr. Rissman: I can repeat it.

Q. (By Mr. Rissman): Tell us what conversation you and Mr. Brewer had at that time about your going back to work at Warner Bros.

Mr. Mitchell: Same objection.

Trial Examiner Riemer: Same ruling, overruled.

The Witness: Well, I had heard that Mr. Brewer was keeping us out of our jobs. I wanted to find out whether there was any truth to it. I went in and I told him that several of us had charges against us, but that the majority of us didn't, and I asked him to please let these men get back to work, they needed the work and had lost quite a bit, and I pleaded with him, and he says, "George, believe me, we're not keeping these men out of their jobs." I says, "You mean to say that [197] I could go back to Warner Bros. tomorrow if I could get my job back?" He says, "Yes, you can go back there or

(Testimony of George Stoica, Jr.)

anyplace else you want to. We're not keeping you out of that job."

And he went on tell me his experiences in the labor movement and all that work.

Q. (By Mr. Rissman): After January, 1946, did you make any further attempts to see anyone at the studio with respect to getting your job back?

A. After January, 1946?

Q. Yes, or did you make any other attempt in addition to what you have already told us?

A. That was November.

Q. At any time after November did you make any further attempts to get your job back at Warner Bros.?

A. No, I don't believe I have. [198]

* * *

Q. Did you have any reason for refusing to go work in the carpenter shop in March of 1945?

A. Several reasons.

Q. What were your reasons?

A. In the first place my work as a hardware man brought me in contact with carpenters and set designers, and I felt that if I went in there and done carpenter work that when the strike ended that I would not be able to run that department efficiently.

Q. Did you ever state that reason to any Warner Bros. company official or executive?

A. I stated that reason to Fuzzy Fuhrmann many times, every time and any time I saw him. I tried to make it clear to him and convince him that every time a carpenter or a set designer walked into

(Testimony of George Stoica, Jr.)

that shop after the strike was over that it would cause nothing but trouble and unsatisfactory work.

Q. Did you have any other reasons for not wanting to work in the carpenter shop?

A. Yes, as I started to say a while ago, I called my wife up——

Mr. Luddy: If we are going to be advised of his acts because of something his wife said, I submit it is a waste of [199] time to take it in the record.

The Witness: I'll put it this way——

Trial Examiner Riemer: Give us your reason.

Q. (By Mr. Rissman): Give us your reason.

A. The reason was my wife said she wouldn't live with a scab.

Mr. Rissman: That's all.

Cross-Examination

By Mr. Mitchell: [200]

* * *

Q. You say you were handed a blue slip?

A. Right.

Q. Were you willing to do carpenter work?

A. No, sir. [201]

* * *

Q. Were you at that meeting at Jim Peck's house? A. That's right.

Q. Did you return to work with the other men?

A. No, sir, I was the only one that stayed across the street.

Q. You refused to go back in? A. Correct.

(Testimony of George Stoica, Jr.)

Q. You wouldn't do carpentry work?

A. I wouldn't do carpentry work. [202]

* * *

Q. Well, did you receive a copy of Respondents' Exhibit No. 3? A. That's right, I did. [203]

* * *

Q. (By Mr. Mitchell): I will show you I.A.T.S.E. Exhibit No. 1 for identification and ask you if you have ever seen that or a copy of it?

A. That, sir, I have never seen.

Q. Did Mr. Walsh state at the Women's Club meeting in substance what is contained in that letter? A. Yes.

Q. And when was that Women's Club meeting?

A. It was on the Sunday, the 18th, I believe, of March.

Q. On the 19th of March you knew that Warner Bros. wanted you to do work in the carpentry shop, didn't you?

A. Well, I presume that Warner Bros. wanted us to do carpentry work when Mr. Fuhrmann got us together in the carpentry shop and had Mr. Brewer tell us that, yes.

Q. And you didn't indicate any willingness to do carpentry work, did you? A. No.

Q. To the contrary, did you indicate you wouldn't? [204]

A. I didn't indicate anything.

Q. Were you a party to any of those votes that were taken not to do carpentry work?

(Testimony of George Stoica, Jr.)

A. Yes, the one in the prop shop, I might have stuck my hand out.

Q. That you wouldn't do it?

A. I wouldn't do it.

Q. You say that you received a blue slip which said "Refused to do carpentry work" or "Carpenter work."

A. Yes, sir.

Q. And who gave you that blue slip?

A. James Gibbons.

Q. And did you say anything to him about being an error, that you refused to do carpenter work?

A. No, sir. [205]

Q. That was the fact, wasn't it, that you wouldn't do carpenter work?

A. Well, I wouldn't do carpenter work, no.

Q. You didn't make any complaints to him about it and tell him you would like to do carpenter work?

A. No, because I compared it to the other fellows, and it was the same thing.

Q. Well, you knew at that time that you could go on working at Warner Bros. if you would do carpenter work, didn't you?

A. That's right.

Q. And you didn't make any offer to Gibbons or anybody else, did you?

A. No, I did not offer to do carpenter work.

Q. You say you were present at a meeting addressed by Mr. Brewer on March 19th?

A. That's right.

Q. What did he tell you about the carpenters trying to raid the prop makers union?

(Testimony of George Stoica, Jr.)

A. Well, frankly, I didn't pay too much attention to what he was saying.

Q. Well, do you remember anything that he said?

A. Yes, he said something about the carpenters in 1933 had done something to them, and he tried to convince the fellows that if they didn't go in there, that the Conference of Studio Unions would probably take over everything in the industry, [206] take everything in the industry away from the I.A.T.S.E. and we would all be out on our ear—a very dark picture.

Q. And did he urge you to go in and do carpentry work, or whatever work the Producers asked you to do?

A. That's right. [207]

* * *

Q. (By Mr. Luddy): Mr. Stoica, were you aware of the fact that Mr. Walsh, the International president of the I.A.T.S.E., had issued an order directing members of the I.A.T.S.E. to ignore the picket lines which were placed around the studios when the strike began on March 12th?

A. I became aware of it on the afternoon of the 13th.

Q. And you obeyed that order by going through the picket lines, did you?

Trial Examiner Riemer: I didn't get that question. Will you read it?

(The question was read.)

The Witness: Yes.

(Testimony of George Stoica, Jr.)

Q. (By Mr. Luddy): Did you attend the meeting which Mr. Walsh addressed at the Women's Club on Sunday the 18th of March? [218]

A. I did.

* * *

Mr. Rissman: Mr. Mitchell, can we read that into the record by stipulation without the necessity of getting copies?

Mr. Mitchell: It is all right with me.

Mr. Rissman: If the Examiner please, this blue slip, the form which is identical with Respondent's Exhibit 4, reads as follows. I will read only the typewritten——

Mr. Mitchell: I suggest we read the whole thing.

Mr. Rissman: I will read the whole thing then.

"Warner Bros. Pictures, Inc., Badge No.:"
Blank. "Offpayroll notice. Name: George J. Stoica. No.: 87850. Date: 3/19/45. Hour finished: X. Rate: 1.71. Occupation: Hardware man, Local 44. Department: Technical. Remarks: Refused to do carpenter work. All company property has been checked in and payment to employee is hereby authorized. Storekeeper:" The line is blank. "Approved: F. C. Fuhrmann."

Attached to it is a white slip which reads as follows:

"Warner Bros. Pictures, Inc., Burbank, California. Clearance Ticket. Date: 3/19/45. Permission is hereby granted to George J. Stoica, prop shop, to remove from the studio the following personal property: Tool pass. I have examined the

(Testimony of George Stoica, Jr.)

above material and authorize its removal from the studio. F. C. Fuhrmann, Department [229] Head, B.D.”

Q. (By Mr. Rissman): Were those two slips given to you on the evening of March 19, as you testified yesterday? A. That's right. [230]

* * *

L. G. BATCHELDER

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. Lynn George Batchelder.

Trial Examiner Riemer: Is that spelled L-y-n-n?

The Witness: That's right.

Q. (By Mr. Rissman): Are you the person who is named in these proceedings as L. G. Batchelder?

A. Yes.

Q. Were you employed at Warner Bros., Mr. Batchelder? A. Yes.

Q. And how long were you employed there?

A. A short time, maybe a month and a half, something like that.

Q. Some time before when?

A. Before the strike.

Q. What kind of work were you doing there?

(Testimony of L. G. Batchelder.)

A. Prop making.

Q. And in which departmetn or which shop?

A. I had work in both shops at the time, most of the time in the cabinet shop.

Q. Who was your immediate supervisor? [232]

A. I worked both under Jesse Sapp and Peck.

Q. When you were working at Warner Bros. were you a member of any labor organization?

A. A member of Local 44, I.A.T.S.E.

Q. And how long had you been a member of Local 44, I.A.T.S.E.?

A. I will look it up and see, if I have it with me. I have my card with me but I believe at that time it was——

Q. When did you first become a member of that local?

A. I don't remember. It was about two years at that time.

Q. Do you recall that you became a member of that local in approximately October of 1942?

A. I know it was in October or November and it would be approximately about 1942.

Q. And did you remain a member in good standing from the time you became a member and all the time that you were working at Warner Bros.?

A. Yes.

Q. Are you a member of any labor organization now?

A. The only card that I have is the I.A.T.S.E., Local 44, which I had a suspension of six months

(Testimony of L. G. Batchelder.)

and a \$300 fine. I did not pay the \$300 fine. My dues are paid, however.

Q. What kind of work were you doing on March 10, 1946?

A. I was working in what is known at Warner Bros. as the cabinet shop, part of the prop making department, and I believe, I am not absolutely positive, because I was working on [233] the set for a while, was working on a lucite piano, but as I remember I was on the jet part of the lucite top, I believe, I was on the lucite top. I am not positive.

Trial Examiner Riemer: Did you say March 10, 1946, Mr. Rissman?

Mr. Rissman: If I did I am mistaken. It was March 10, 1945. May the record be corrected?

Trial Examiner Riemer: Yes.

Mr. Rissman: Is that what you understood?

The Witness: I understood it 1945, just before the strike is what I understood.

Q. (By Mr. Rissman): Did you work on March 12, 1945? A. Yes, I worked—on March 12?

Q. That is the day of the strike.

A. No, that is the day of the strike. No, I did not.

Q. Did you work the following day?

A. No. I believe it was Thursday that I—

Q. Directing your attention to March 19, 1945, did you work on that day?

A. March 19, I believe that was the last day that I worked at Warner Bros. [234]

(Testimony of L. G. Batchelder.)

Mr. Rissman: Will you stipulate that the slip which the witness has handed to me and which I have now in my hand has typed in his name, Lynn G. Batchelder, No. 05015, date 3/19/45, hour finished X rate per day, occupation prop maker, department technical, remarks, refused to do carpenter work.

Mr. Mitchell: I will so stipulate.

Mr. Rissman: Thank you. [235]

Q. (By Mr. Rissman): When did you get that blue slip, Mr. Batchelder, and from whom?

A. Just before it was quitting time at Warner Bros., as I remember it, I believe Mr. Jimmie Gibbons, who was head of the property making shop at Warner Bros., gave it to me. It had a tool pass attached to it, but I took my tools out at that time.

* * *

Q. March 19th, the day on which you received the blue slip.

A. Yes, I did.

Q. Do you recall what was said by Mr. Fuhrmann at that time?

A. We were called into the shop as a group and Mr. Fuhrmann spoke to us and he said that they were going to keep the studios open regardless of what, and that we would be expected to do whatever they asked, carpenter, painting and machinists, or anything that they asked, and he wanted us as a group to say whether we would or we would not, and he said, "If you don't do this, you will not work at Warner Bros. again, and don't misunder-

(Testimony of L. G. Batchelder.)

stand me, boys; furthermore, you will not only not work at Warner Bros. but you will not work in the motion picture industry again." [236]

* * *

Q. Did you ever have any conversation with Mr. Fuhrmann after March 19, 1945, with respect to getting your job back at Warner Bros?

A. Yes, I called after the strike was over and we went to go in and there was no cards for us, they would not allow us to go in, so Mr. George Stoica tried to call them and was unable to get them.

Mr. Mitchell: Can we have a date before we hear this conversation?

Q. (By Mr. Rissman): What was this date that all this happened?

A. Well, George Stoica called up the day that the strike was over.

Q. The last day? A. When they all went in.

Q. When all the fellows were coming back?

A. Yes.

Q. All right. Go ahead.

A. And I am not positive of the date, but I believe it was the next day that I called Mr. Fuhrmann up on the telephone finally and got hold of him and asked if there was a call for my job, L. G. Batchelder, and he said there was not; stand by. So I stood by. [238]

Q. Are you willing to go back to your former position at Warner Bros.? A. Yes, I am.

Q. Have you been willing to go back and accept

(Testimony of L. G. Batchelder.)

reinstatement to your old position at all times since March 19, 1945? A. At Warner Bros., yes.

Q. At Warner Bros. A. Yes.

Mr. Rissman: That is all.

Cross-Examination

By Mr. Mitchell: [239]

* * *

Q. (By Mr. Mitchell): Did you receive a copy of Respondent's Exhibit 3, which I now show to you?

A. Well, I received a copy like that, outside there was no seal on it. It says seal here. I don't know whether it is this—— [240]

* * *

Q. Did you attend the meeting in the mill at Warner Bros. on March 19, 1945, at which Mr. Brewer directed the Local 44 members to cross jurisdictional lines and perform any work that was assigned to them by the studio representatives?

Mr. Rissman: Object to the form of the question.

Trial Examiner Riemer: Overruled. You may answer.

The Witness: Yes, I attended that meeting where Mr. Brewer spoke. I don't remember——

Q. (By Mr. Mitchell): What was that last?

A. I said I don't remember. I didn't finish it. I don't remember his exact words. They were in that substance, however.

Q. Did you attend the meeting on the same day in the prop shop at which Mr. Fuhrmann directed the propmakers to do carpenter work?

(Testimony of L. G. Batchelder.)

A. Very definitely, I did. [242]

* * *

Q. (By Mr. Mitchell): On March 19, 1945, did you attend a meeting at Warner Bros. at approximately 6:30 p. m.?

A. I did.

Q. And at that meeting did Mr. Fuhrmann again direct the men, the Local 44 prop makers, to do carpentry work?

Mr. Rissman: Object to the use of the word "direct." I have no objection to his stating what occurred there.

Trial Examiner Riemer: Objection sustained.

Q. (By Mr. Mitchell): Where was the meeting held at 6:30 in Warner Bros.?

A. In a little office in the middle of the big building there.

Q. Who was present?

A. Oh, the majority of the morning shifts. I do not know all of them.

Q. Prop makers?

A. That's right.

Q. Were Mr. DuVal and Mr. Fuhrmann present?

A. Part time, yes.

Q. All right. Now, during the time that they were present, [244] just state as near as you can what happened from the beginning, giving if you don't remember their exact words, the substance of what was said.

(Testimony of L. G. Batchelder.)

A. Well, the substance was the same as before, asking us to do that work.

Q. Well, just what did Mr. Fuhrmann say, as near as you can remember?

A. Well, at that time there was a great deal of talk going on and just exactly what Mr. Fuhrmann said—it was all in the same substance, so I wouldn't—

Q. Did he tell you that it was Warner Bros.' instruction to you to go in there and do carpenter work?

A. No, not at that time. As I remember the discussion it was whether we would or not.

Q. Well, at this meeting didn't he ask you to go in and do carpenter work?

A. I couldn't say that he did at that time. The whole discussion at that meeting as far as Mr. Fuhrmann is concerned was whether we would or not. He had told us previously.

Q. He had told you to go in previously, to go in and do carpenter work?

A. He had asked us if we would as a group.

Q. He told you that Warner Bros. wanted you to. Was there any question about that? [245]

* * *

The Witness: He asked us to as a representative of Warner Bros.

Q. (By Mr. Mitchell): He did more than that, he told you that if you didn't do it, you would never work at Warner Bros. again, didn't he?

A. He told us if we didn't we would never work

(Testimony of L. G. Batchelder.)

at Warner Bros. again or in the motion picture industry, make no mistake about it.

Q. He made it perfectly clear that Warner Bros. wanted you to and was directing you to do carpenter work, didn't he?

A. He made it perfectly clear that Warner Bros. wanted us to. [246]

* * *

Q. After October 31, 1945, did you put your name on the I.A.T.S.E. Local 44 call book?

A. No, I did not. [249]

* * *

Q. Well, you know that Local 44 maintains a hiring hall in which they send employees to the various studios, don't you?

A. Oh, yes, I know that.

Q. Do you know that the way to get employment through Local 44 is to sign the call book, don't you?

A. No, I don't know that that is the only way, because that is a way. However, a majority of the studio men, if they are capable at all, do not as a general rule work through the call book except when there is a slack period of a few days and they want extra work, because they are known to all the studios and therefore we call up the studio and talk to them, that way.

Q. Yes, but when a man is out of work and the studio doesn't call him back, you know that a way is available to him to get other employment through signing up the call bok, isn't that right?

(Testimony of L. G. Batchelder.)

A. Well, they have a call book for that purpose, yes.

Q. Isn't what I said right?

A. I said they have a call book for that purpose. I presume that answers it. [251]

* * *

Redirect Examination

By Mr. Rissman:

Q. You were asked by Mr. Mitchell if you would have gone back to work at Warner Bros. between March 19th and October 31, 1945, to do carpenter work or to work in the carpenter shop, and you answered that you would not.

A. That is right.

Q. Why wouldn't you?

A. Because I don't care to be a scab. I don't care to do the other fellow's work. I don't feel that the working man has any right to go in and do the other fellow's work. They won't do themselves any good and they won't do Warner Bros. any good and they won't do their country any good. [257]

■ ■ ■

JOHN G. GOUDIE

a witness called by and on behalf of the National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. John G. Goudie.

Q. Where do you live, Mr. Goudie?

A. 11171 Blick Street, North Hollywood.

Q. Were you employed by Warner Bros.? [266]

A. I was. [267]

* * *

Q. Did you return to work at Warner Bros. on June 3rd, 1936?

A. As a grip.

Q. How long did you continue working as a grip?

A. Until the 10th day of March, 1945.

Q. From June 3, 1936, to March 10, 1945, were you ever off from work at Warner Bros. for any reason whatsoever? * * *

A. In 1937, I think it was the first two weeks in May and the last week in May of that year, I was laid off on call.

Q. And after the end of May, 1937, were you ever laid off at all while working at Warner Bros. as a grip?

A. Only in slack times. In other words, at times

(Testimony of John G. Goudie.)

that they would say we have no work now for probably a week, and in that time they would give me a ring and I would work one day in that week, and they done that three consecutive weeks in 1938. I think that was in April.

* * *

Q. While you were working at the studios from June 1936 to March 10, 1945, were you a member of any labor organization?

A. I was a member of the I.A.T.S.E.

Q. Which local?

A. Local 37, which eventually changed to 80.

Q. What is a grip?

A. Well, their duties are, you might say, a second hand carpenter or a second class carpenter rather.

Q. Let's not start any quarrels with the carpenters here. [269]

A. They have the erecting of platforms for lighting the sets, taking care of the scrim work, backings, making them into backings, and they are, you might say, an assistant to the camera man in shooting pictures. They roll the iron horse and set the diffusion, and so forth. [270]

* * *

Q. Are you a member of any labor organization at the present time?

A. I am still a member of Local 80, I.A.T.S.E.

(Testimony of John G. Goudie.)

Q. Are you working at the present time?

A. No, I am not.

Q. Has there ever been a time when you were not a member in good standing of Local 80 since you first joined that union? A. Never.

Q. Did you go to work on March 12, 1945?

A. No, I went to the studio and they had a picket line across the entrance, so I didn't go through.

* * *

Q. Did you go to work at any time between March 12, 1945, and October 31, 1945?

A. No, I didn't.

Q. Why not?

A. Well, I figured that I was still an employee of Warner Bros. I had never been laid off. My work had always been satisfactory, and I had never put my name on the call book at the local in all the time that I had belonged to 37 and 80 until I think it was February either 14th or 15th of this year, and I always got my calls, if I was off from work one night or a day, I always got my call direct from the studio, and I figured that I was a permanent employee of Warners.

Q. Did you ever get a call from the studio during the strike? A. No.

Q. Directing your attention to October 31, 1945, did you at that time have any conversation with any of your superiors [274] or supervisors at Warner Bros.?

(Testimony of John G. Goudie.)

A. The afternoon that the men went back in, I went to Mr. Ketcham and I asked him if he had a call for me and he said no. A call is a job. And he says, "I think I have your telephone number up there, haven't I?" and I says, "Yes, you have" and that was the end of the conversation [275]

* * *

Q. (By Mr. Rissman) : Did you have any conversation with Mr. Barrett at any time in January, 1946, with respect to [295] your signing the call book?

A. Yes.

Q. Approximately when was it?

A. I think it was on the 21st day, I believe, of January.

Q. Was it a telephone conversation?

A. Yes.

Q. Tell us what you said and tell us what Mr. Barrett said in that conversation.

A. I called the local and was answered by Bill Holbrook, the secretary of our local, and I asked him if a member that was in good standing was eligible to accept work at any major studio and he says, "Yes, if you sign the out-of-work book or the call book, why," you was eligible.

Q. Was this conversation with Mr. Holbrook rather than Mr. Barrett?

A. Yes, this was Mr. Holbrook. He says, "Wait just a minute. I'll turn you over to Bill Barrett." So I asked Mr. Barrett the same question and he gave

(Testimony of John G. Goudie.)

me the answer that if your name was on the call book and a call came in and you was in good standing, you was eligible to go into any major studio. I said, "Then if my name was on the call book and Warner sends in a call for a grip, would I get that?"

He says, "Oh, no, you have got a case against Warner Bros." [296]

* * *

Q. Did you ever get any call from Warner Bros. to return to your job as a grip?

A. No, I have not.

Q. Did you ever get any call from Local 80 to go to work as a grip at Warner Bros.?

A. No, I haven't.

Q. Did you ever get any call from Local 80 to go to any other place as a grip? ..

A. Yes, I signed the call book on February 14. I got a [297] call that night at 6:00 o'clock to report at Republic Pictures at 6:00 o'clock in the morning.

Q. Did you report to Republic?

A. Yes.

Q. How long did you work there?

A. I worked five days.

Q. Did you ever receive any other calls from Local 80?

A. No, I never did. I never signed the book after that. [298]

* * *

(Testimony of John G. Goudie.)

Redirect Examination

By Mr. Rissman:

Q. Mr. Goudie, in all the time that you worked for Warner Bros., whenever you were off because of lack of work or for any other reason, was it necessary for you to sign the call book to get your job back? A. No, sir.

Q. Were you always called back?

A. I was either called back, at times when it was a little bit slack our foreman would take three or four men out of the gang and say you lay off tomorrow night and come back the following night, and then they would rotate the rest of the men during that slack period.

Mr. Rissman: That is all.

Recross-Examination

By Mr. Mitchell:

Q. Mr. Goudie, on previous occasions, on [301] occasions of a layoff, then the studio after that when they decided they needed you again would notify you, is that right? A. That is right.

Q. Were there occasions when you failed to show up for some reason?

A. Not that I know of, unless I was sick or something like that.

Q. Well, were there occasions when you were sick?

(Testimony of John G. Goudie.)

A. Oh, yes, I have been known to be sick several times.

Q. Didn't you notify the studio when you were ready to go to work again?

A. No, sir, I just went and started in, just as though——

Q. You just went in?

A. Just went in and worked like that, like I worked Tuesday and I would go back on Wednesday morning.

Q. You didn't wait for a call from them, did you?

A. No.

Q. You just went in when you got well and reported ready to work?

A. That is what I did at the time of the termination of the strike. It was stipulated everybody was to return as of March 10th, and I understood that was the agreement with all of the boys that was out, regardless of whether they was on strike or not, and I went in, but they had no call for me. [302]

* * *

CHARLES J. LARSON

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Mr. Luddy: May we go off the record a moment?

Trial Examiner Riemer: Off the record.

(Testimony of Charles J. Larson.)

(Discussion off the record.)

Trial Examiner Riemer: On the record. The witness has been sworn.

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. Charles J. Larson.

Q. Were you employed at Warner Bros., Mr. Larson?

A. Yes, sir.

Q. When did you work there?

A. Well, from 1934 until the strike.

Q. That is up to March 12, 1945?

A. Well, I worked to the 19th.

Q. What kind of work did you do at Warner Bros. during that period 1934 to March 1945?

A. Started in as a laborer, then as a rigger, then as a grip.

Q. How long did you work as a grip?

A. Since the time the grip took over the rigging crew, which [304] was in 1942, I think it was, or 1941, I don't know which.

Q. At any rate, since some time in 1942 you have been working as a grip?

A. Yes, rigger and a grip.

Q. Under whose supervision?

A. Working with Lamie Ketcham.

Q. During the time that you worked as a grip,

(Testimony of Charles J. Larson.)

were you a member of any labor organization at the studio? A. I. A. T. S. E. 80.

Q. Local 80 of the I. A. T. S. E.? A. Yes.

Q. How long were you a member of that organization? A. 11/1/42.

Q. Are you still a member? A. Yeah.

Q. Are you in good standing at the present time as far as you know? A. Yes.

Q. Did you go to work on March 12, 1945, the first day of the strike? A. No.

Q. When did you go to work after March 12, 1945, keeping in mind that that was on a Monday?

A. It would be the 15th.

Q. That would be on Thursday of that week?

A. Thursday, yeah.

Q. And where did you go?

A. Went into the grip room.

Q. Did you work as a grip on that day?

A. Yeah.

Q. How long did you continue working as a grip after March 15, 1945?

A. To the 19th, about 10:00 o'clock in the morning when they asked me to do carpenter work and I said no.

Q. Who asked you to do carpenter work?

A. Tull, foreman of the grip gang.

Q. Is that T-u-l-l? A. Yes.

Q. And can you tell us what conversation you and Mr. Tull had at that time?

A. There wasn't no conversation. He said, "If

(Testimony of Charles J. Larson.)

you don't do carpenter work, go over to the grip room."

Q. Did you go over to the grip room?

A. Yes.

Q. Whom did you see there?

A. I had to wait for Ketcham to come in and I asked him to get my discharge slip and availability slip.

Q. Now when you say "discharge slip" are you referring to the blue slip? A. Yes. [306]

Q. The kind that has been introduced as Respondent's Exhibit 4?

A. Well, yes, the discharge slip that you are through working there and also I wanted my availability slip.

Q. Did you get an availability slip or a discharge slip?

A. No. He said they had issued too many of them already and wasn't issuing any more of them. He says, "You just go home."

Q. Did you ever get any discharge slip from Warner Bros. after that? A. No.

Q. Did you ever make any attempt to go back to work at your job as a grip? That is, after March 19, 1945?

A. Yes, after the strike was over.

Q. What did you do?

A. I was told to call in the grip office, which I did.

Q. Who told you to call the grip office?

(Testimony of Charles J. Larson.)

A. I don't remember who it was told me, but I was told to call there and find out whether I was going in or not.

Q. Did you call the grip office? A. I did.

Q. And do you know with whom you spoke?

A. Well, it was Mr. Ketcham's office but I don't know who was on the telephone that told me that it was no——

Mr. Mitchell: Wait a minute, now. You have answered [307] the question. Let's get some foundation as to what date this was.

Q. (By Mr. Rissman): When was this?

A. The 12th.

Q. The 12th of what.

A. That would be November.

Q. 1945? A. Yes.

Q. And you called the grip office but you don't know with whom you spoke, is that it? A. No.

Q. Was it a man or a woman? A. Man.

Q. What conversation did you have with whoever answered the telephone there.

A. I asked them——

Mr. Mitchell: I object to it as being no proper foundation laid.

Trial Examiner Riemer: Sustained.

Mr. Mitchell: He may have talked to the office boy or somebody else.

Q. (By Mr. Rissman): Did you ask for Mr. Ketcham's office? A. Yes.

Q. Was Mr. Ketcham there as far as you know?

(Testimony of Charles J. Larson.)

A. I don't know. [308]

Q. Do you know with whom you spoke?

A. Evidently it was the fellow in charge there, taking care of the telephone.

Q. Had you——

Mr. Mitchell: I move that the answer be stricken on the ground it is not responsive.

Trial Examiner Riemer: Motion to strike denied. [309]

Q. (By Mr. Rissman): Had you ever called into the office there before while you were working?

A. Yes.

Q. And left any messages there? A. Yes.

Q. For what purposes had you formerly, or earlier, called the office?

A. Well, if you were off some time, or wanted to be off some time, you had to call in and let them know.

Q. Well, when you called in for those purposes, did you know with whom you were talking? Did you know the name of the person?

A. Just a clerk in there, whoever it happened to be.

Q. And have you left messages with whoever answered the telephone there in the past?

A. Yes.

Q. And have you received any messages from them? A. Yes.

Q. And is that what you did on or about November 10th, or was it 12th? A. The 12th.

(Testimony of Charles J. Larson.)

Mr. Mitchell: I object on the ground it is leading and suggestive. He is trying to tell the witness what to say.

Mr. Rissman: The witness has already said it.

Trial Examiner Riemer: Overruled. [310]

Mr. Rissman: May the question be read?

Trial Examiner Riemer: Read the question.

(The question was read.)

Trial Examiner Riemer: You may answer it.

The Witness: Yes.

Q. (By Mr. Rissman): What conversation did you have with whoever answered that telephone in that department?

Mr. Mitchell: I object to that on the ground it is immaterial what conversation he had with some office boy or clerk.

Trial Examiner Riemer: May be, but I'll take it. Overruled.

Q. (By Mr. Rissman): You may answer it.

A. He told me that there was no call for us, and also he would let me know if one come in.

Q. Did you give him your name — did you have any conversation with Mr. Ketcham?

A. Yes.

Q. When did that occur?

A. About the 2nd, I believe, of November, or December — after the strike.

Q. 1945? A. 1945, yes.

Q. What conversation did you have with Mr. Ketcham?

(Testimony of Charles J. Larson.)

A. I asked him to go back in and go to work.

Q. What did he say?

A. He said he didn't know, we would have to find out from the union. [312]

* * *

Q. (By Mr. Rissman): Did your local, Local 80 of the I. A. T. S. E. declare a strike against the studios in March, 1945? A. No.

Q. Did you participate in the picket lines, or in any of the strike activities of the people who were on strike? A. No.

Q. Did you tell anybody representing Warner Bros. that you [313] were on strike?

A. I don't know just what you mean.

Q. Did you ever tell any of your bosses at Warner Bros. that you were striking?

A. Well, I wasn't striking, with the exception that I wouldn't go through the picket line.

Q. What did Mr. Tull ask you to do on or about March 19th, 1945?

A. Put up a set on the stage.

Q. Now, was that your work as a grip, putting up sets? A. Not that, no.

Q. Whose work was that? A. Carpenter's.

Q. What did you tell Mr. Tull when he asked you to put up a set on the stage?

A. I told him that two weeks before that they told me I couldn't put up a board to fill in between two walls, on account of that was carpenter work, so I absolutely couldn't set up a set.

(Testimony of Charles J. Larson.)

Q. Did you have any reason for refusing to do carpenter's work when you were asked to do so by Mr. Tull? A. Yes.

Q. What was your reason?

A. I wouldn't take another man's job that was out on strike.

Q. Before you were a member of Local 80, I. A. T. S. E., were [314] you ever a member of any other labor union? A. 724, 727.

Q. Those are Laborers' Locals of the American Federation of Labor?

A. Yes, the American Federation of Labor.

Q. And Local 727 is a local affiliated with the I. A. T. S. E., isn't it? A. Yes.

Q. How long were you a member of each of those unions, Local 724 A. F. of L. and Local 727 I. A. T. S. E.? A. I don't remember.

Q. Altogether how long have you been a member of any labor union?

A. I have been for a good many years, different labor unions, and those were at the studios, and the first one must have been 1935 or 1936, and then from then on, between the two until I joined 80. [315]

* * *

Q. (By Mr. Rissman): Were you ready and willing and able to go back to work at Warner Bros. to your former job as a grip? A. Yes.

Q. Have you been ready, willing and able to do that at all times since the end of the strike?

(Testimony of Charles J. Larson.)

A. At all times.

Mr. Rissman: Take the witness.

Cross-Examination

By Mr. Mitchell:

Q. Did you ever sign the Local 80 call book after the end of the strike?

A. Yes, I did once.

Q. When?

A. When Mr. Goudie signed it too, the 14th I think it was, somewhere around, I don't really remember.

Q. Did Local 80 send you out on a job?

A. No. One trouble was I didn't have no telephone at the [316] time, or they probably would have called me. I don't know.

Q. Did you sign it again, or keep your name in the call book? A. No.

Q. Did you have another job? A. No.

Q. Didn't you want a job?

A. For Warner Bros., yes.

Q. Anybody else? A. Not necessarily, no.

Q. Well, you were not willing to work for anybody else except Warner Bros., were you?

A. Well, I left Warner Bros., and figured I was entitled to go back there.

Mr. Mitchell: Will you read him the question, please?

(The question was read.)

(Testimony of Charles J. Larson.)

Mr. Rissman: I submit the question has been answered.

Trial Examiner Riemer: I suppose in his own way that is an answer.

Mr. Mitchell: Maybe you understand the answer?

Trial Examiner Riemer: I think I do.

The Witness: If you figure that I was not willing to go to work for anybody else, it would depend a lot on what job it was, how far it was to travel, and several things like that.

Q. (By Mr. Mitchell): Did you make an effort to get another [317] job? A. No.

* * *

GEORGE M. HAND

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. George M. Hand.

Q. Were you employed by Warner Bros., Mr. Hand? A. I was.

Q. How long were you employed there?

A. I have been there approximately two years, maybe a little better, two years, or maybe a little better.

Q. And when did you work there?

(Testimony of Charles J. Larson.)

A. I worked there, last worked there on March 19th.

Q. 1945? A. 1945.

Q. In what department were you working? [318]

A. Prop shop.

Q. What kind of work were you doing?

A. Prop making, rigging, high man, high work.

Q. Who was your boss there?

A. Gus White was my boss.

Q. And did you work under anybody else?

A. Jim Gibbons. Jim Gibbons was the head boss.

Q. During the time that you worked for Warner Bros., were you a member of any labor organization?

A. I belonged to the I.A.T.S.E. Local 44.

Q. And how long were you a member of that union? A. Since 1939.

Q. Were you always in good standing in that union?

A. I don't quite get your question.

Q. Were you always a member in good standing?

A. Yes, sir.

Q. Are you a member of that Local today?

A. Yes, sir, up to the time they—my dues are paid for next month. I am under suspension, six months suspension, but my dues are paid up for this quarter, which ends November 1st., I believe.

Q. 1946? A. 1946.

Q. When did you receive notice of the suspension? Was that on about June 14th or 15th?

(Testimony of George M. Hand.)

Mr. Mitchell: I object to that on the ground that is already the subject of a stipulation.

Trial Examiner Riemer: It has been covered hasn't it? Doesn't the stipulation cover all these questions of suspension and expulsion?

Mr. Luddy: It does, but not the fines, and that only becomes material where the fines have not been paid, by reason of the clause of automatic expulsion.

Trial Examiner Riemer: I believe that question has been answered.

Q. (By Mr. Rissman): Do you know approximately when you received notice of the suspension?

A. Yes, I received my suspension some time in May, I believe. I was working at the time for United Artists, and I was fired on the orders of the union for the United Artists some time in May, just the date I don't remember.

Q. Before the strike was started on March 12, 1945, did you ever work in the carpenter shop at the Warner Bros. studio? A. No, sir.

Q. Were you ever asked to work in the carpenter shop during that time? [320]

A. I was.

Q. When were you asked?

A. I was asked I think it was the 19th of March.

Q. Well, my question is directed to before the strike, to before March 12, 1945, were you ever asked to work in the carpenter shop?

(Testimony of George M. Hand.)

A. No, I was not.

Q. Were you ever sent to work in the carpenter shop?

A. No, sir.

Q. As a prop maker, what are some of the operations you performed there at Warner Bros.?

A. Well, I worked at prop making, takes up a lot of operations. It takes up the special effects, it takes up sometimes snow boxes, it takes up going high and putting up the snow boxes and operating them, and it takes fog making, fog for the sets and special effects, and it takes in the building of boats and miniature boats and operating them.

Q. What was your classification?

A. Prop maker, miniature builder and special effects.

Q. Did you receive a blue slip on March 19, 1945?

A. Yes, sir.

Q. Did you bring that with you?

A. Yes, sir.

Mr. Rissman: Mr. Mitchell, could we stipulate to read into the record the typewritten material on this slip, which [321] in printed form is identical with the Respondent's Exhibit No. 4?

Mr. Mitchell: Yes.

this slip, which [321] in printed form is identical with the printed form of Respondent's Exhibit No. 4, reads, the typewritten material reads as follows:

"Name, George M. Hand, No. 38721; Date 3/19/45, Hour Finished, X; Rate paid per day; Occupation, prop maker; Department, technical; Remarks, re-

(Testimony of George M. Hand.)

fused to do carpenter work," and it is signed "F. C. Fuhrmann."

Q. (By Mr. Rissman): Did you go to work on March 12, 1945? A. No, sir, I did not.

Q. When did you go to work after that?

A. I think it was the Wednesday morning, I think it was the second day after that. I went in when the rest of the boys went in.

Q. That would be March 14, 1945?

A. I think it was March 14, to be exact.

Q. How long did you continue to work there after that? A. Until March 19th.

Q. What occurred on March 19th with respect to your employment?

A. Well, we were told, we were asked, called together and asked by Fuzzy Fuhrmann, like a demand, to go into the shop and do carpenter work, and told the sets were necessary and [322] we were to go and build them sets.

Q. What else did he say?

A. So then, well, just before that, previous to that we were asked by the union representatives, Cappy DuVal and Roy Brewer and the other one I don't remember who it was, and was told that it was a strike and we had to go in and help them because the studios asked us to do it, and then when we went back to work again at prop making, just a little time after that, maybe an hour or so, after that, Fuzzy Fuhrmann came along and we were told that we were to go in the shop and do

(Testimony of George M. Hand.)

carpenter work, and the boys, somebody asked the explanation, as I remember right one of the boys was asked to go and he says that he had never done carpenter work because he is a metal man and doesn't even carry a saw and doesn't know how to operate a machine or anything. It is proper under the law to——

Q. Tell us what was said.

A. That was all that was said. He said if we didn't go in and do carpenter work that was it, it would be the blue slip.

Q. Did you go in to do carpenter work then?

A. No, we did not.

Q. How long after that did you get the blue slip?

A. We got the blue slip I believe around 2:30 in the afternoon. Mr. Gibbons brought the slips out and called everybody [323] over.

Q. Did you ever go back and try to get your job back after March 19, 1945?

A. I didn't quite get the question.

Q. After you received the blue slip, did you at any time ever go back and try to get your job back at Warner Bros.?

A. Well, I didn't try to get my job back with them, as there was a telephone call came from Warner's, told me to report to the carpenter shop.

Q. It was a telephone call?

A. That call came, I don't remember whether it was that same night, somebody called and told my

(Testimony of George M. Hand.)

wife that I was to report to the carpenter shop and do such work, set building, that was to be in the carpenter shop.

Q. Did you report? A. No, I did not.

Q. Did you have any reason for not wanting to do set work or carpenter work? A. Yes, I did.

Q. What was your reason?

A. Because I didn't want to be a scab. I didn't want to take jobs away from other men or other crafts and work which did not belong to us.

Q. After the strike, did you ever try to get your job back? [324] A. Yes, sir, I did.

Q. What did you do in that respect?

A. Well, I went with Mr. Lora to answer the phone and called up the shop, because I am a little hard of hearing, and he answered the phone, took him for that purpose.

Q. Are you referring to Raymond Lora who is in the courtroom?

A. Ray Lora, yes, sir; he called up the shop, and he couldn't get anyplace, so I understand, couldn't get anyplace and we was told there we had to report to the union, and see Mr. Brewer or Cappy DuVal of the union in order to get back.

Q. Were you ever called back to work by Warner Bros. after the strike? A. No, I was not. [325]

* * *

(Testimony of George M. Hand.)

Cross-Examination

By Mr. Mitchell:

Q. Mr. Hand, since the date of the termination of the strike, October 31, 1945, have you been employed?

A. Been employed since the termination of the strike?

Q. Yes.

A. Yes, sir, I was employed at United Artists.

Q. During all that period of time?

A. No, not during all of that period of time. Probably—I don't remember just when—I went in some time after the strike.

Q. How long after?

A. I believe I went in in January and worked a week or two for general service through the local, through the call office at the local.

Q. You signed the call book? A. Yes, sir.

Q. When did you sign the call book?

A. I think the call book was signed some time in November, I believe. [334]

Q. Of 1945?

A. Yes. I think it was some time in November. I don't just remember the dates or anything, but it was some time after the termination of the strike, and I got a call. I believe I worked two days of last year for Monogram and then I think—I worked about three days of that year, I think, about three days—and then after the first of the year, why, they sent me to United Artists.

(Testimony of George M. Hand.)

Q. Have you been there ever since?

A. Then I worked at United Artists and they got slack and I was laid off and then I was recalled there again—not through the call office but through the boss of United Artists—and I worked up until the union ordered me discharged for the suspension.

Q. Well, how long a period of time were you laid off at United Artists?

A. Oh, maybe a week or two, something like that.

Q. So that except for a week or two since some time in January 1946 up until June you were working steadily at United Artists?

A. That is right. [335]

* * *

Q. Did you attend the meeting across from Warner Bros. Studio on March 13th at which Mr. DuVal read a telegram from Mr. Walsh dated March 12, 1945 directing Local 44 members to cross the picket lines?

A. I was there with that group, yes.

Q. And on or about March 13, 1945 did you receive a copy of Respondent's Exhibit No. 3, which I show you?

A. Yes, I believe I did receive a copy of that. I believe I did. [336]

* * *

Q. (By Mr. Mitchell): Were you present at a meeting on March 19, 1945 in the mill at Warner Bros.?

A. Yes, sir, I was.

(Testimony of George M. Hand.)

Q. Did you hear Mr. Brewer direct the prop makers to cross jurisdictional lines and perform any work assigned by the studios?

A. No, I was a little hard of hearing and I didn't quite get the drift of the conversation.

Q. Did you learn at any time that Mr. Brewer had directed [337] the prop makers at Warner Bros. to do any work assigned by the studios?

A. Through Mr. Fuhrmann, through Mr. Fuhrmann's meeting of the 19th, when we were ordered to go in there into the carpenter shop and do the carpenter work.

Q. You didn't hear Mr. Brewer say anything like that? A. No, sir, I did not.

Q. On March 19, 1945, at a meeting in the prop shop, did Mr. Fuhrmann direct the Warner Bros. prop makers to do carpentry work?

A. He did.

Q. Did you refuse? A. I refused.

Q. Were you at any time willing to do carpentry work? A. No, sir.

Q. At no time during the period between March 19, 1945 and October 31, 1945?

A. That is right.

Q. You were not willing to do carpentry work?

A. I was not willing to do it.

Q. Even though requested to do it by the studio?

A. That is right. [338]

* * *

Q. Now in addition to being suspended for a

(Testimony of George M. Hand.)

period of six months by that sentence, were you also filed the sum of \$300? [339] A. Yes, sir.

Q. And did the sentence provide that with respect to the fine of \$300 that it was payable within two months from the date of the notification of the sentence, and if within the two months' period that fine was not paid you would stand automatically expelled from the I.A.T.S.E. and Local 44?

A. That is right.

Q. Now, you have never paid the fine of \$300, have you? A. I did not. [340]

* * *

RAYMOND M. LORA

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Please state your name.

A. Raymond M. Lora.

Q. Are you the same person who is named in these proceedings as R. M. Lora?

A. That is right.

Q. Were you employed by Warner Bros., Mr. Lora? A. Yes, sir. [343]

Q. When? A. Approximately two years.

Q. Up until when? A. March 19, 1945.

(Testimony of Raymond M. Lora.)

Q. And what was your occupation at Warner Bros.?
A. Prop maker.

Q. How long have you been a prop maker?

A. Three years.

Q. Were you a member of any labor organization during the time you were working for Warner Bros.?
A. I.A.T.S.E., Local 44.

Q. How long had you been a member of Local 44?

A. November 1st, 1943.

Q. Are you still a member of Local 44?

A. No, sir.

Q. When did your membership expire?

A. May 31, 1946.

Q. Were you one of those who was expelled?

A. Expelled.

Q. Before you were a member of the I.A.T.S.E., were you a member of any other labor organization?

A. Local 1052, United Brotherhood of Carpenters and Joiners.

Mr. Luddy: I can't quite hear you.

The Witness: Local 1052, United Brotherhood of [344] Carpenters and Joiners.

Q. (By Mr. Rissman): A. F. of L.?

A. Right.

Q. And where is Local 1052?

A. 9034 Beverly Boulevard, Beverly Hills—I should say Melrose Avenue, Beverly Hills.

Q. Is that a local of the Carpenters Union outside of the motion picture industry?
A. Right.

(Testimony of Raymond M. Lora.)

Q. What kind of work were you doing during the time that you were a prop maker at Warner Bros.?

A. Working on a process body—well, all types of prop making.

Q. Did you do any special effects work?

A. Yes.

Q. What is special effects work?

A. Special effects pertains to making of fog, smoke, fire, explosions, some types of wind, snow, cobwebs, spider webs——

Q. I think that is sufficient, unless you want to give us some more. Under whose supervision did you work?

A. In special effects?

Q. In special effects, or in working in the prop shop?

A. In the prop shop, under Gus White.

Q. How about special effects? [345]

A. That is Freddie Ponedel.

Q. What is his title?

A. I couldn't tell you that. I don't know.

Q. Is he in the prop department?

A. He is not.

Q. Or is special effects a separate department?

A. At Warner Bros. the special effects is a separate department from the prop shop.

Q. Immediately prior to March 12, 1945, were you working in the prop shop or were you working on special effects?

(Testimony of Raymond M. Lora.)

A. Working in the prop shop.

Q. What kind of work were you doing?

A. Working on a process, 1941 Buick, I believe it was, building the process body. My particular job on that was cutting segments from the doors and regular framing of this automobile.

Q. What type of material were you using?

A. Well, it was wood, some metal and some canvas and rubber.

Q. Did you go to work on March 12, 1945?

A. No, sir.

Q. On March 13, 1945, did you hear any statement or did you have any conversation with Mr. DuVal of the I.A.T.S.E.? A. No, sir, I didn't.

Trial Examiner Riemer: Wait a minute. That is a [346] double question there. I don't know what the witness' answer means.

Mr. Rissman: Well, I will rephrase the question.

Q. (By Mr. Rissman): On March 13, 1945, did you have any conversation with Mr. DuVal, Cappy DuVal? A. No, sir.

Q. At any time on March 13, 1945, did you hear him make any statement or speech or address the workers in any manner? A. No, sir.

Q. When did you go to work after March 10, 1945?

A. I went Thursday, the following Thursday.

Q. That would be March 15?

A. Thursday, yes, it would be the 15th. I went a day after the rest of the boys went.

Q. And what kind of work did you do for the balance of that week?

(Testimony of Raymond M. Lora.)

A. I worked on this process body.

Q. Were you on the day shift?

A. Day shift.

Q. How long did you continue to work on the process body? A. Until 2:30, March 19th.

Q. Directing your attention to March 19, 1945, did you attend any meeting out at the studios that was addressed by Roy Brewer?

A. Yes, sir. [347]

Q. Where was that meeting held?

A. In the mill at approximately 11:00 o'clock.

Q. How did you happen to be at the mill at that time?

A. Mr. White spoke to us all and he told us to go in the mill, that they were all congregating in there. For what reason, I didn't know.

Q. Now what did Mr. Brewer say at that time and place? A. He said a whole lot.

Q. Tell us what you recall.

A. He told us that the I.A.T.S.E. intended to keep the studios rolling, and asked each and every one of us to help as far as we could, to do whatever work that we were asked to do and the whole substance was keeping the studios rolling.

Q. Was there any other conversation or statement by anybody at that meeting at that time and place?

A. I don't recall any at that meeting.

Q. Did you hear any address or statement made by Mr. Fuhrmann on March 19, 1945?

(Testimony of Raymond M. Lora.)

A. That was a meeting in the prop shop.

Q. All right, what time of the day was that?

A. That was around noontime.

Q. And what did Mr. Fuhrmann say?

A. Well, he came and told the boys that he expected us to go over in the mill and lay out the sets and build the sets, [348] that the sets was what he needed right then, it wasn't props—he needed sets and he expected each and every one of us to help them out as much as we could. [349]

Q. Did he say anything else?

A. Yes, the question was asked him by one of the boys, what would happen if we didn't go in and build those sets, or do whatever they asked us to do. Mr. Fuhrmann said that we would be eliminated from the studios if we didn't do as instructed.

Q. Did anything else occur at that meeting around noon which was addressed by Mr. Fuhrmann?

A. I don't remember.

Q. Was any vote taken at that time as to whether the men would or would not go into the carpenter shop?

A. Yes, there was a vote taken. I can't remember whether it was Mr. Sapp or Mr. Gibbons that asked us who would go in, and finally someone said, "What do you mean, go in?" or something like that, and then they said, "Who won't go in?" and I think everyone raised their hands, they wouldn't go in.

Q. Did you go into work in the carpenter shop?

(Testimony of Raymond M. Lora.)

A. No.

Q. Did you have a reason for not going?

A. Why, I had lots of reasons for not going in.

Q. What were your reasons?

A. My card didn't call for me to do carpenter work, and therefore there is no union that is authorized to have you work other than what your card calls for, and I just couldn't go in there and scab, you know, and scab on fellows that live [350] right in my immediate neighborhood. Eight or nine of them live right out there in Burbank right with me, and I couldn't go in and do their work while they were out there in that picket line. I couldn't do that.

Q. Did you get a blue slip on March 19th?

A. Yes.

Q. Do you have it with you? A. Yes.

Mr. Rissman: Mr. Mitchell, may we stipulate that this blue slip which you have just examined in printed form is the same as Respondent's Exhibit 4?

Mr. Mitchell: And that it contains thereon as the name Raymond M. Lora, the number 54673, the date 3-19-45, the rate \$1.71, the occupation prop maker, the department, technical, the remarks: Refused to do carpenter work, and the signature as approved, F. C. Fuhrmann, yes.

Mr. Rissman: Thank you very much.

Q. (By Mr. Rissman): Who gave you that blue slip, Mr. Lora? A. Jim Gibbons. [351]

* * *

(Testimony of Raymond M. Lora.)

Q. Did you attend any other meeting of the prop makers at any time around March 19th or 20th or in through there?

A. I believe it was the afternoon of the 20th. I wouldn't [357] be certain, but I believe the afternoon of the 20th all of the prop makers assembled in the leather room over the cabinet shop.

Q. The leather room?

A. Well, it is a balcony over the cabinet shop. They call it the leather room.

Q. How did you happen to be assembled there at that particular time?

A. I got a call from someone to be there.

Q. Someone from the studio or one of the workers who had been discharged?

A. Out of the technical office, as I recall.

Trial Examiner Riemer: What is the date of this?

The Witness: The 20th.

Mr. Rissman: The afternoon of the 20th.

The Witness: Tuesday.

Q. (By Mr. Rissman): Which would be the same afternoon that—the afternoon of the same day that you met across the street from the plant and decided not to go into the carpenter shop?

A. As I recall, that's the day. I didn't make any notes, or anything.

Q. Well, at least it's around that time?

A. Yes, it is.

Q. And you got a call from someone in the technical office to come to the meeting? [358]

(Testimony of Raymond M. Lora.)

A. Yes, I believe it was.

Q. And you went in response to that call?

A. That's right.

Q. Who was present when you got there?

A. There was all of the prop makers that had been dismissed, and three or four, as I recall, that worked on the afternoon shift.

Q. Who was in charge of that meeting?

A. At that time, as I recall, we elected as chairman Bill Simpson.

Q. Is he one of the employees who was discharged?

A. That's right.

Q. And what occurred at that time?

A. Well, we talked it over, whether we would go back or not, and various one's opinion on it, and we got various opinions on it, and it was a unanimous vote that we would not go back in; that is, the mill. We were willing at all times to work as prop makers and to do our work, but we would not go over in that mill. We voted unanimous to that stand not to go over in that mill and scab. [359]

* * *

Q. When was the next time you went back to see anyone at the studio about getting your job back?

A. Well, the day that the whole bunch of men went back, October 31, I guess it was.

Q. That was when everybody was supposed to go back, the end of the strike?

A. Everybody was supposed to.

Mr. Mitchell: Just a moment. I object to that

(Testimony of Raymond M. Lora.)

question upon the ground it assumes a fact not in evidence, and it is leading and suggestive.

Mr. Rissman: I will rephrase it. [364]

Mr. Mitchell: There never was an occasion when everybody was supposed to go back.

Trial Examiner Riemer: Isn't that the Cincinnati agreement?

Mr. Mitchell: No. That agreement was that the strikers were to go back, not these I.A.T.S.E. men that wouldn't do the work that was assigned to them.

Trial Examiner Riemer: Objection sustained.

Mr. Rissman: We will argue that when we come to it.

Q. (By Mr. Rissman): Are you referring to the date that the picket lines were taken off and employees went back to work?

A. That is right.

Q. And did you apply for your job or attempt to get back to work that day?

Mr. Mitchell: Just a moment. I object to that on the ground it calls for a conclusion. I don't object to having the conversation, but having the thing characterized and getting an answer without any foundation is what I am objecting to.

Trial Examiner Riemer: Overruled.

Q. (By Mr. Rissman): Do you want the question read, Mr. Lora?

A. It was 1:00 o'clock——

Trial Examiner Riemer: Do you want the question read [365] back?

(Testimony of Raymond M. Lora.)

The Witness: No, I recall the question. It was 1:00 o'clock, so the employees at Warner Bros. formed three lines in front of the studios to go in to the various windows inside of the time office to sign up to go back to work. Most all of them were inside, had already went through, and us prop makers were standing, there was no line for us, and I asked Mr. Fuhrmann where our line would be.

Q. (By Mr. Rissman): Was Mr. Fuhrmann at the gate there?

A. No, sir. I went inside the time office after him and I asked him what line we would get into, and he says, "Well, you boys don't have a line." I said, "That is strange, you were supposed to get your orders from Mr. Pat Casey to put us to work, that was my understanding." And he says, "Well, as yet I haven't got that word." I said, "I wish you would talk to Mr. Sachs and see if he has got the word."

Q. Who is Mr. Sachs? A. Mr. Sachs is——

Q. Is he the labor relations manager of Warner Bros.?

A. That is right. Up until 8:00 o'clock that night there was no word from Mr. Casey with regard to us going back to work. The whole bunch of us waited right there, but we couldn't get in because they didn't take us back. [366]

Trial Examiner Riemer: Mr. Rissman, I don't think this record discloses who Mr. Casey is.

Mr. Rissman: Can we stipulate, Mr. Mitchell, that

(Testimony of Raymond M. Lora.)

Pat Casey is chairman of the producers' labor committee?

Mr. Mitchell: No, that is not correct. Mr. Pat Casey is chairman of the producers' committee.

Mr. Rissman: He testified to that.

Mr. Mitchell: No, he didn't testify to that. He is chairman of the producers' committee, which is a committee of the New York presidents of the companies, and an entirely different committee than the producers' labor committee. If you want to stipulate to that, I will be glad to stipulate that fact.

Mr. B. B. Cahane is chairman of the producers' labor committee at the present time. I don't remember whether was then or not.

Trial Examiner Riemer: Is that agreeable to you, Mr. Rissman?

Mr. Rissman: For the time being it will be. I will get it correctly later.

Mr. Mitchell: Well, if we are stipulating it——

Trial Examiner Riemer: Either you stipulate or you don't.

Mr. Mitchell: Stipulate not for the time being. If you want to stipulate, it is all right with me. [367]

Trial Examiner Riemer: I am sure Mr. Mitchell states the fact.

Mr. Rissman: I will stipulate that Mr. Casey is the chairman of the producers' committee.

Mr. Mitchell: That is right.

Trial Examiner Riemer: It does get a little confusing.

(Testimony of Raymond M. Lora.)

Mr. Mitchell: Well, I am sorry, but if it is confusing it is only confusing because the facts are confusing, and you don't want me to stipulate to something which is not true.

Trial Examiner Riemer: I thought he was chairman of the producers' labor committee.

Mr. Mitchell: No, sir, he is chairman of the producers' committee, which is a committee of the New York presidents of the major producing companies. The local studios of the producing companies have a committee called the producers' labor committee, which is composed of Mr. B. B. Cahane, Mr. Manix, Mr. Freeman and Mr. Work.

Trial Examiner Riemer: I get it.

Q. (By Mr. Rissman): Did you make any other attempts to contact anybody from Warner Bros. about going back to work after the end of the strike? If so, what were those attempts, and to whom did you talk and when?

A. You mean that same day?

Q. Any time, that day or any other time. [368]

A. Well, up until 6:00 o'clock we hadn't heard anything on the day we all went back, and after 6:00 o'clock our little group went inside the office in where the time clock and the time cards are, and Mr. Wright——

Q. Who is he?

A. He is production manager, I believe, of Warners.

Q. Go ahead.

(Testimony of Raymond M. Lora.)

A. He came passing by, and George Stoica and myself were right there, and George was asking if there was any word yet, or words to that effect, whether we were going back to work or not, and he said no, that there was nothing that he knew of. So we went back inside and we milled around there and observed all the time cards, who was working and who was not working. Then about 8:00 o'clock we left and went home. My next contact——

Q. What did you observe with respect to who was and who was not working in the prop shop?

A. I noticed there was quite a few permit men's cards in the rack, that I knew was permit men unless they had been taken into the local while the strike was going on.

Q. Did you make any other attempt to get your job back?

A. I went down November 6th. Mr. Hand and myself went in the little time office there where they keep the cards, to the inside telephone communications place, and I called [369] the prop shop and I asked for Mr. Gibbons and they asked who it was and I told them, and I said, "Mr. Gibbons, how about going back to work?"

And he told me that I would have to get it straightened out with my local first. I said, "What do you mean? My dues are paid up and I am in good standing."

He says, "Well, you get straightened up," and bang, that is all there was. He hung the phone up.

(Testimony of Raymond M. Lora.)

Q. Had you ever been advised by anybody prior to your conversation with Mr. Gibbons—that was November 6th, did you say?

A. The 6th, I believe it was the 6th.

Q. 1945, that you were not in good standing with the local?

A. No.

Q. Did you pay your dues?

A. Yes.

Q. Did you receive any notice of any kind, either oral or written, from any officer or representative of Local 44 that you were not in good standing?

A. No.

Q. Did you have any further conversation with Mr. Gibbons or Mr. Fuhrmann or any other Warner Bros. Studio official regarding your reinstatement?

A. None as I recall.

Q. Are you willing to accept reinstatement now to your former position?

A. Gladly. [371]

Q. Have you been willing to accept reinstatement to your former job at all times since March 19, 1945?

A. Yes, I have.

Q. Are you working now?

..

A. No.

Mr. Rissman: That is all.

(Testimony of Raymond M. Lora.)

Cross Examination

By Mr. Mitchell:

Q. Did you attend the meeting at the Women's Club on March 18, 1945, which was addressed by Mr. Richard Walsh?

A. Yes, sir.

Q. What did Mr. Walsh say with respect to crossing jurisdictional lines or doing work that the studios asked you to do?

A. That in short he expected each and every one of us to go into the studios and keep them rolling, and to just work in whatever capacity it might be. That is the substance of the whole talk.

Q. Did anybody ask him to put it in writing?

A. Not that I recall.

Q. I will show you I.A.T.S.E. Exhibit No. 1 for identification and ask you if you have seen that or a copy of it before?

A. I haven't got my glasses here.

Q. Do you want them?

A. I haven't got them here. [372]

Q. I will read it to you if you want.

A. Yes, I believe I have seen that.

Q. You will have to answer so the reporter can hear you.

A. I believe I saw that.

Q. When did you see that, Mr. Lora?

A. I think Tuesday. That would be the 20th, I believe.

(Testimony of Raymond M. Lora.)

Q. You received one through the mail?

A. I don't remember. I read it some place. I don't know whether I received one or I read it some place. Where, I couldn't tell you. [373]

* * *

Q. Did you place your name on the local 44 call book?

A. I didn't go down personally to write the name there, if that is what you mean.

Q. Well, if you are out of work and you want to get work through Local 44, do you go down and sign the book yourself?

A. No, as I understand, you report to the fellow in the call office and he writes your name down.

Q. Did you do that?

A. I know I telephoned to the man with the call book, Royal Lowe, and I asked him if he would place my name on the list, and he said that he would, he said although he may be instructed later on to strike it off the list, that he would put it on.

Q. When did you ask him to do that?

A. I believe that was November 6th.

Mr. Rissman: 1945?

The Witness: 1945.

Mr. Mitchell: It has to be 1945, can't be 1946, and we are not talking about 1944, so it must be 1945.

The Witness: That is right.

Q. (By Mr. Mitchell): Did you get any call from Local 44 for a job after that?

A. No.

(Testimony of Raymond M. Lora.)

Q. When did you complete your work, all this cabinet work on this kitchen job? [375]

A. I would have to look at my stub checks. I personally don't know.

Q. Well, it was some time in the summer of 1946.

A. I should say January, February and March. I think that would be close enough.

Q. Somewhere around the first of April, did you try to get another job then?

A. Yes, there was another one that I had, but I couldn't get the lumber.

Q. Did you try to get any other jobs other than that job?

A. I couldn't get any, because there was a lumber freeze, you understand.

Q. Let's put it this way: What jobs did you try to get between October 31, 1945, and the present date? The only job you tried to get and got was this kitchen job for three months.

A. That is right, I got that.

Q. Now, what others?

A. Well, I remember this particular one, I found that I couldn't get lumber, so I didn't try again.

Q. Were those the only jobs you tried to get?

A. That's right.

Q. Other than registering or asking somebody to register you in the Local 44 call book in November, 1945, did you, prior to January 1st, make an effort to get any other job? A. No.

(Testimony of Raymond M. Lora.)

Q. And other than this job that wasn't available because of the lumber freeze, did you, subsequent to April 1st, 1946, make an effort to get any other job?

A. No, I haven't made an effort. I haven't felt too good.

Mr. Rissman: May I have the last part of the answer?

Trial Examiner Riemer: Read the answer.

(The record was read.)

Q. (By Mr. Mitchell): You mean you have been too sick to work?

A. Not too sick, but I just haven't felt like it.

Q. You haven't felt like working?

A. Mentally and physically.

Q. You haven't felt like working.

A. That's right.

Q. How long has it been that you haven't felt like working, since April 1st?

A. Since March 19th, 1945. [377]

* * *

Redirect Examination

By Mr. Rissman:

Q. What did you mean in response to questions by Mr. Mitchell that you haven't felt like working since March 19th, 1945?

A. Well, it kind of broke me up to think that a union would treat their membership like some of us boys have been treated. [378]

(Testimony of Raymond M. Lora.)

Q. Now, this work that you did at the Italian Kitchen, the cabinet work, were you employed by somebody, or did you take that job by yourself and do it on a contract basis for the restaurant?

A. I worked for them by the day.

Q. On October 31st, 1945, did the carpenters go back to work?

A. Yes.

Q. Did the painters go back to work?

A. Yes.

Q. The electricians?

A. Yes.

Q. Did all of the various crafts or unions, employees, go back to work that day, to your knowledge?

A. To the best of my knowledge.

Q. And do you know who was on strike from March 12th, 1945, to October 31st, 1945, what unions were on strike?

A. 1421, the set designers.

Mr. Rissman: That's all.

Trial Examiner Riemer: Mr. Mitchell?

Mr. Mitchell: Yes.

Recross-Examination

By Mr. Mitchell:

Q. Mr. Lora, 1421 was on strike, as you say. Then weren't they having strikers' meetings? Do you know anything about that? A. No. [379]

(Testimony of Raymond M. Lora.)

Q. Didn't you know that the carpenters and painters were joining in the picket line?

A. Oh, yes, I could see that.

Q. And that there were representatives of the carpenters and painters and I.B.E.W. on the so-called strike strategy committee? You knew about that, didn't you?

A. No, I don't know anything about that.

Q. Well, you surely read something about this, didn't you?

Mr. Rissman: I object to that.

Trial Examiner Riemer: Overruled.

The Witness: Yes, I probably did.

Q. (By Mr. Mitchell): Well, didn't you know that the members of the Conference of Studio Unions were supporting this 1421 strike?

A. 1421 was on strike. The carpenters and the painters were observing their picket line. That's the way I understand it.

Q. And didn't you know—they were not only observing it, they were in the picket line.

A. I told you the way I understood it.

Q. You saw them in the picket line, didn't you?

Mr. Rissman: I object. The question has been answered.

Trial Examiner Riemer: No, it hasn't been. Overruled.

Q. (By Mr. Mitchell): Did you hear the question?

(Testimony of Raymond M. Lora.)

A. That I saw the carpenters and painters in the picket line? [380]

Q. Yes.

A. Yes, I saw them in the picket line.

Q. Did you see the I.B.E.W. in the picket line?

A. I couldn't tell you that.

Q. Did you see the screen story analysts in the picket line?

A. I couldn't tell you that either.

Q. Did you see the Cartoonist's Guild members in the picket line?

A. No.

Q. Did you see the Publicists in the picket line?

A. No.

Q. Did you see Herb Sorrell in the picket line?

A. No.

Trial Examiner Riemer: Anything else, Mr. Mitchell?

Q. (By Mr. Mitchell): Were you in the picket line?

A. No, sir.

Mr. Rissman: Object.

Q. (By Mr. Mitchell): Did you see any of these I.A.T.S.E. prop makers in the picket line?

Mr. Rissman: I object.

Trial Examiner Riemer: Sustained.

Mr. Mitchell: All right. No more questions.

Mr. Luddy: No more questions.

Q. (By Trial Examiner Riemer): Mr. Lora, do you know if the 19 men who voted at the Peck meet-

(Testimony of Raymond M. Lora.)

ing to return to work in [381] the mill were employed during the strike?

A. I saw various ones go in and out, yes. They worked there, the ones that went back in, yes, sir, they worked.

Trial Examiner Riemer: I don't think Mr. Luddy and Mr. Mitchell heard that answer.

Mr. Mitchell: No. Can it be read to us?

Mr. Rissman: Before going to that, Mr. Examiner, I think we ought to inquire as to the nature of the ballot at Mr. Peck's home.

Trial Examiner Riemer: I am not interested in the nature of the ballot.

Mr. Mitchell: Can we have that answer read before we get too far away?

Mr. Rissman: I mean this, if there was a secret ballot, he would have no way of knowing which ones voted one way or the other.

Q. (By Trial Examiner Riemer): Was that ballot at the Peck meeting by a show of hands or a secret ballot, or in writing, or how was it taken?

A. Secret ballot.

Q. Did you ask for an availability slip?

A. Yes, sir.

Q. Whom did you ask?

A. Someone at the time office there. I don't know their name.

Q. What was the answer? [382]

(Testimony of Raymond M. Lora.)

A. I was told they weren't issuing any.

Q. When was this, Mr. Lora?

A. That was, I guess that was about two months after——

Q. After what, March 19th? ..

A. After March 19th, yes, somewhere along in there. [383]

* * *

ROBERT N. BONNING

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your full name.

A. Robert N. Bonning.

Q. Were you employed at Warner Bros., Mr. Bonning?

A. I was.

Q. And how long were you employed there?

A. Approximately two and one-half years.

Q. And in what capacity?

A. Oh, out of that two and one-half years, I was one of the shop foremen. ..

Q. In what shop?

A. For approximately two years and two months or so.

Q. What shop?

(Testimony of Robert W. Bonning.)

A. Prop shop.

Q. And under whom did you work?

A. Jimmie Gibbons.

Q. How long have you been in the motion picture industry?

A. 1940.

Q. What kind of work did you do in the industry before you worked there, Mr. Bonning?

A. I worked about three of those years in the sheet metal [390] trade.

Q. Now, at Warner Bros. did you work in any particular kind of props?

A. All types of props.

Q. Did you specialize in any particular type with respect to the material used?

A. In my own actual working in the metal as a foreman and everything.

Mr. Mitchell: Will you read that answer?

Trial Examiner Riemer: Read the answer.

(The answer was read.)

The Witness: In all types of props.

Q. (By Mr. Rissman): During the time that you were working at Warner Bros. were you a member of any labor organization?

A. 44 at Warners.

Q. Local 44 of the I.A.T.S.E.?

A. Local 44 of the I.A.T.S.E.

Q. How long were you a member of Local 44?

A. Four years.

Q. Are you still a member?

A. Yes, I am.

(Testimony of Robert W. Bonning.)

Q. Were you a member of any other labor organization at any time?

A. 108, sheet metal.

Q. Is that the Sheet Metal Workers International Union, [391] A. F. of L.?

A. That's in the building trade.

Q. That is the A. F. of L. Sheet Metal Workers Union? A. That's right.

Q. Did you work at any time during the month of March, 1945, after March 12th of that year?

A. Yes, I did.

Q. When did you work after March 12th?

A. I believe it was March 14th we went back to work.

Q. And where did you work when you went back to work on March 14th?

A. I worked in the metal room in the back of the prop shop.

Q. And how long did you continue to work there?

A. Until I was discharged March the 19th.

Q. Now, do you recall what kind of work you were doing from March the 14th to March 19th?

A. On mechanical steer.

Trial Examiner Riemer: Mechanical what?

The Witness: Mechanical steer.

Q. (By Mr. Rissman): Now, on March 19th, 1945, were you working in this metal room of the prop shop? A. I was.

Q. Did you attend any meeting of employees in

(Testimony of Robert W. Bonning.)

the prop shop during working hours on that day?

A. I did. [392]

Q. Tell everything that happened when you came to work on that day.

A. Well, there were rumors that we were going to have to go into the mill to do carpenter work and Jesse Sapp came around to get the boys' opinion on whether we would go in the mill, and I understood it was unanimous that we would not go into the mill.

Q. Did you hear any—or were you present at any time when Mr. Fuhrmann addressed the employees on that day? A. I was.

Q. At what meeting were you present?

A. On the one that was held in the mill and the one that was held at the prop shop.

Q. Which one was the first one?

A. The mill.

Q. Is that the one——

A. Where Mr. Brewer addressed the employees.

Q. Mr. Brewer? A. Yes.

Q. All right. And were you present when Mr. Fuhrmann addressed the employees?

A. I was.

Q. And did you go to work in the carpenter shop? A. No, I did not.

Q. Why didn't you? [393]

A. For several reasons.

Q. What reasons?

A. Well, one has already been stated, the scabbing. That was one reason. Another reason was all

(Testimony of Robert W. Bonning.)

machines in the mill have signs on them: "To be operated by machine operators only." There was a state compensation law that I don't think would protect us if we operated them.

Q. Have you ever operated the type of wood-working machinery that is found in the mill?

A. No. No, I haven't. There is small types of machinery that is in the mill that we have in the prop shop.

Q. All right. Were there any other reasons?

A. Well, I have a lot of personal friends that is carpenters. I chum around with them.

Q. Did you get a blue slip on March 19, 1945?

A. I did.

Q. By whom was it signed?

A. Fuzzy Fuhrmann.

Q. Do you have it with you? A. I do.

Q. Will you read to us what is typewritten after the printed word "occupation" on your blue slip?

A. "Technical"—or "prop maker."

Q. And department?

A. "Technical." [394]

Q. And what is written or what is typewritten after the printed word "remarks"?

A. "Refused to do carpenter work."

Q. When was that blue slip given to you?

A. On the afternoon of March 19.

Q. By whom?

A. I believe it was Jimmie Gibbons.

Q. Did you work in the studios at Warner Bros. at any time after March 19? A. I did not.

(Testimony of Robert W. Bonning.)

Q. Did you ever have any conversation with any company representative after the strike ended?

A. I did.

Q. When?

A. I believe it was some time in November.

Q. Some time when?

A. In November, I believe.

Q. November, 1945? A. That is right.

Q. With whom did you have the conversation?

A. I called Jimmie Gibbons and asked for my job back.

Q. What did Gibbons tell you?

A. He referred me to Fuzzy Fuhrmann.

Q. What did Mr. Fuhrmann say?

A. Mr. Fuhrmann—— [395]

Q. Did you talk to Fuhrmann? A. I did.

Q. Over the telephone?

A. Over the telephone.

Q. What did he say and what did you say?

A. He said he couldn't do anything for me, that I would have to contact the Local 44. [396]

* * *

Trial Examiner Riemer: It may be admitted and marked in evidence as Board's Exhibit 8.

(The document heretofore marked Board's Exhibit No. 8 for identification was received in evidence.) [399]

Q. (By Mr. Rissman): Are you working now, Mr. Bonning? A. I am.

(Testimony of Robert W. Bonning.)

Q. In the motion picture industry?

A. Yes.

Q. Where are you working?

A. Enterprise Studios.

Q. And what kind of work are you doing?

A. Prop shop foreman.

Q. How long have you been at Enterprise?
That's Enterprise Studios?

A. Enterprise Studios.

Q. How long have you been there?

A. Approximately five or six months.

Q. Now, before you started to work at Enterprise, did you have any permanent employment any place or any regular job?

A. No, I didn't.

Q. Do you have a permanent job now?

A. I do.

Q. After March 19, 1945, were you ready and willing to go back to work in the prop shop at Warner Bros.?

A. I was.

Q. Are you willing to go back there now?

A. Well, I have a good job now and I decided when I took that job that I wouldn't go back to Warners. [400]

* * *

Cross-Examination

By Mr. Mitchell:

Q. What was your job classification at Warner Bros. on May 10, 1945—

Mr. Rissman: May or March?

Mr. Mitchell: March 10th, I mean.

(Testimony of Robert W. Bonning.)

The Witness: Prop maker.

Q. (By Mr. Mitchell): Well, I'll show you Respondents' Exhibit No. 2, turning to the wage scale there. Just tell me which job classification you were working in. A. March 10th?

Q. Just before the strike.

A. I was taken off of the rate about a week or so before I went on this special job. I was put on the morning shift to do this particular job.

Q. Let's go back two weeks before March 10th, 1945. What [401] was your job classification?

A. As I say, a prop maker.

Q. Then you weren't a forman?

A. As I say, I was taken off the rate just prior to that job. Now, I don't know just what day it was. They have it in the record.

Q. Let's go back to the first of 1945, the first of January. What was your job classification then?

A. I was prop shop foreman.

Q. On a weekly salary?

A. On an hourly rate.

Q. Well, just show me which of these job classifications you were in then because I don't think there is a prop shop foreman on an hourly rate.

A. Right here it is. That's the new rate.

Q. You are referring to prop and miniature gang boss?

A. Well, I had not one gang—and that's what I class a gang boss—I had several gangs working out of the shop.

(Testimony of Robert W. Bonning.)

Q. All right. Your rate of pay was \$2.05 an hour? A. \$1.95.

Q. \$1.95 per hour—that was in January, 1945?

A. Well, this is just a new listing of retroactive pay. This is a new list. We were still on \$1.95 in January, February and March.

Q. This is the contract which went into effect on January [402] 1st, 1944, and was signed on April 17, 1944, and the retroactive pay was paid long before January 1st, 1945, I am sure, Mr. Bonning.

A. I may be mistaken on that. I remember it to be \$1.95. It might have been \$2.05. [403]

Q. At any rate, the job classification you were it was T-2, prop and miniature gang boss. Is that right? A. That's right.

Q. You continued in that classification through January and February, 1945, and some time in March, 1945, you were taken off that?

A. That's right.

Q. Now, what were you put on in the latter part of February or first of March, 1945?

A. Prop maker.

Q. Is that T-3, prop and miniature journeyman, \$1.80? A. That's right.

Q. Now, isn't that the classification in which you were working on March 10, 1945?

A. There is some discrepancy there. I have a check right here and the rate was \$1.71.

Q. Does this check you have show the rate on it, Mr. Bonning? A. My discharge slip shows it.

Q. Well then, on March 14, 1945, March 15th

(Testimony of Robert W. Bonning.)

and so on up until the 19th, you were working as a prop and miniature journeyman, is that right?

A. That's right.

Q. And your rate instead of being \$1.80 was \$1.71, is that right?

A. That's right. That may have been retro-active. We might [404] have got that 9 cent raise there later. I don't remember now.

* * *

Q. On March 19th in the meeting at the mill addressed by Mr. Brewer, what did Mr. Brewer say with respect to doing carpenter work or crossing jurisdictional lines?

A. He said that we would be required to do anything the studio asked us to do.

Q. Specifically, did he mention carpenter work?

A. That I don't remember.

Q. At the meeting on the same day in the prop shop addressed by Mr. Fuhrmann, what did he tell you about that same subject?

A. He asked us all to go into the mill and wanted to know who would go into the mill.

Q. And were you one of those that declined?

A. I was. [406]

* * *

JOSEPH P. CUCCIA

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. My name is Joseph P. Cuccia, C-u-c-c-i-a.

Q. Mr. Cuccia, did you work at any motion picture studio before the strike of March, 1945?

A. Yes, I worked at Paramount when I started to work in the studios in the first part of 1942.

Q. How long did you work at Paramount? [417]

A. I worked from the first part of March until the 6th or 7th of June of 1942, when I went into Columbia Pictures.

Q. And from June, 1942, how long did you work at Columbia?

A. I worked until August 31st, when I was inducted into the United States Army.

Q. August 31, 1942? A. 1942, yes, sir.

Q. And how long were you in the Army?

A. I was in from August 31, 1942, and I was honorable discharged the 31st of April, 1943, a medical discharge.

Q. Now, after your honorable discharge from the United States Army, did you return to work at Columbia? A. Yes, sir, I did.

Q. When did you go back there?

(Testimony of Joseph P. Cuccia.)

A. In the first part of May—1st, 2nd or 3rd, somewhere around in there.

Q. 1943? A. 1943.

Q. What kind of job did you have at Columbia before you went into the Army?

A. I was a laborer, which was more or less—we stood by with companies and swept the stages and when the grips struck the sets we would load them on the trucks and send them out to the ranch where they stored all their sets.

Q. When you say “when the grips struck the sets,” you are [418] referring now to taking the sets apart?

A. Yes, dismantling them, the walls, and loading them on the dollies—what we call dollies.

Q. You are not referring to the type of strike which results in a stoppage of work?

A. No, sir.

Q. When you returned from the Army, what kind of work were you given at Columbia?

A. The same thing, just stand by with the companies and when the companies weren't shooting, we would kind of clean up around there.

Q. Now, who was your superior and who was your boss after you returned from the Army?

A. Tom Stevens.

Q. How long did you work under Tom Stevens?

A. Until the date that I was terminated.

Q. And when was that?

A. April 3rd at 10:00 o'clock in the morning, 1945.

(Testimony of Joseph P. Cuccia.)

Q. Did you have any other boss other than Tom Stevens?

A. Well, we had a pusher by the name of Vern Woodland. He was nothing but—just like a straw boss.

Q. Were you a member of any labor organization while you were working at Columbia?

A. Local 727.

Q. Of the I.A.T.S.E.? [419]

A. I.A.T.S.E., yes, sir.

Q. Who is Al Erickson?

A. He is our business representative of Local 727.

Q. Now you say you were discharged on April 3, 1945?

A. Yes, sir.

Q. On that day did you attend any meeting of employees at your studio which was addressed by Mr. Erickson and in the presence of the foreman?

A. No, it wasn't that day. It was a week previous—a week or eight days previous to that, it was—previous to April the 3rd. We had a meeting on Stage 4.

Q. Who was present on Stage 4?

A. Most of the 727 boys, which I think, roughly guessing, there were about 10 or 15 boys, Al Erickson, his body guard, and Tom Stevens.

Q. How did you happen to be on Stage 4 at that time?

A. I was called down from Stage 1 to Stage 4 by telephone.

Q. Who called you?

(Testimony of Joseph P. Cuccia.)

A. I don't remember if it was Tom Stevens or if it was Vern Woodland, one of the two.

Q. They called you from where you were working and asked you to come to Stage 4?

A. Yes, sir, Stage 4. [420]

Q. Didn't they tell you why you had to be there?

A. They said our business representative wanted to talk to us.

Q. When you got to Stage 4 was Tom Stevens there? A. Yes, he was.

Q. And was he there all the time that you were there? A. Yes, sir, he was.

Q. What was said when you got there and by whom?

A. Well, Erickson got up and said that we had to go into the paint shop, and at that time they wanted us to wash buckets, which we never did do before, but he said one of the boys had to go in and do it, so the boys took a vote in there and the answer was no, they would not go into the paint shop. He said that was the orders he received or else we would be terminated. So then the meeting didn't last very long. He got mad when he heard the answer was no, and he opened the door and walked out.

Q. Who was that, Erickson?

A. Erickson, yes.

Q. Did Stevens say anything at that meeting?

A. No, he didn't. He just stood there and listened.

(Testimony of Joseph P. Cuccia.)

Q. You say this was about a week or eight days before your discharge? A. Yes, sir.

Q. After that meeting and until the time of your discharge [421] what kind of work did you do?

A. I was on Stage 1 with a company, just standing by every day, answering the telephone and opening and closing the door.

Q. Doing the work that you had been doing before the strike? A. Yes.

Q. Your regular work?

A. My regular work.

Q. During that period or at any time before that up until the date of your discharge did anyone ever ask you to work in the paint shop?

A. No, sir, they did not.

Q. Did you ever work in the paint shop?

A. No, sir, I did not.

Q. Were you working on April 3rd in the morning?

A. I was working on Stage 1, yes, with a company.

Q. And what occurred at that time?

A. At about 10:00 o'clock I got a call from Vern Woodland to report to Dave Vail to go painting.

Q. Who is Dave Vail?

A. At the time he was the special effects boss.

Q. Is that V-a-i-l?

A. V-a-i-l or V-e-i-l, I don't remember which. I don't remember how you spell his name.

Q. Did you say anything to Woodland?

(Testimony of Joseph P. Cuccia.)

A. I says, "Oh, no," and I hung up, and I says, "I'll come down to the office."

Q. Did you go down to the office?

A. Yes, I did.

Q. With whom did you talk there?

A. Well, outside I told Woodland I wasn't able to paint and he just shrugged his shoulders as if to say, "What you telling me about it for?"

Q. Did you tell him why you weren't able to paint?

A. He didn't give me a chance. He just shrugged his shoulders. Then I walked into the office and Tom Stevens had my availability slip and card ready and told me to punch it out and that was it.

Q. Did you have any conversation with Stevens?

A. No, I didn't.

Q. Did you get any kind of a discharge slip?

A. Yes, I got a yellow one which is an availability slip.

Q. Is that the slip which is addressed to the War Manpower Commission? A. Yes, sir.

Q. Did you get any other kind of a slip from the company?

A. No, I did not. They wouldn't give me any other kind.

Q. Did you ever have any conversation with Tom Stevens about the nature of your disability which resulted in your honorable discharge from the Army?

A. Yes, upon my return the first day—the first

(Testimony of Joseph P. Cuccia.)

day I returned after I was discharged, I was by the hoist on the lot and he asked me what was the matter and I told him that I was practically blind in my left eye and I had sinus very bad, and that was about all, and he says, "Aw, you'll be all right."

Q. Did you ever have any conversation with Mr. Stevens or Mr. Vail as to why you didn't want to go into the paint shop? A. No, I did not.

Q. Did you have any reason for not wanting to go into the paint shop?

A. Yes, due to physical disabilities for one, and second, I couldn't see myself as being used as a strike breaker.

Q. Did you ever have any conversation with Erickson about getting your job back at Columbia?

A. I did, the following afternoon after I was terminated. I had gone to my local draft board and told them I had been discharged from work and he asked me why and I says because I didn't want to be used as a strike breaker and he says, "I don't blame you." So he called up the local and talked to Mr. Brown which is our secretary of the local. When I got in there I got the third degree from him.

Q. Tell us what happened?

Mr. Mitchell: I object to that as immaterial so far as the respondents are concerned.

Trial Examiner Riemer: Sustained.

Mr. Mitchell: I move the statement that he got

(Testimony of Joseph P. Cuccia.)

the third degree from Brown be stricken out for the same reasons.

Trial Examiner Riemer: The motion to strike that statement is granted.

Q. (By Mr. Rissman): Did anyone call Columbia Studios on your behalf and try to get you your job back?

Mr. Mitchell: Wait a minute. I object to that on the ground it calls for a conclusion, that kind of a question. Apparently this witness is being asked to testify about something somebody else did without any foundation being laid to show that he was there.

Mr. Rissman: I am trying to lay the foundation.

Mr. Mitchell: Well, that gets an answer to the question before the foundation is laid.

Trial Examiner Riemer: Sustained.

Q. (By Mr. Rissman): Who is Mr. Brown?

A. He is the secretary of our local.

Q. Did you have any conversation with Brown about getting your job back at Columbia?

A. No, I didn't. He told me I had to wait and talk to Mr. Erickson.

Q. Did you have a conversation with Erickson about getting your job back? A. Yes, I did.

Q. Approximately when was that? [425]

A. In the afternoon after I had been terminated.

Q. The same day? A. The same day.

Q. Where did the conversation take place?

A. In Local 727 which is on Lillian Way, just a block from Santa Monica Boulevard.

(Testimony of Joseph P. Cuccia.)

Q. In the office of 727, I.A.T.S.E.?

A. Yes, sir.

Q. Who is Mr. Guild?

A. He was the labor conciliator of Columbia Pictures at the time. I understand he was fired.

Q. Now, while you were with Mr. Erickson did he have any conversation with Mr. Guild?

A. Yes, he spoke to him over the telephone. He said he had a fellow "here" that was a veteran and the Veterans Bureau had been stepping all over him for firing veterans and Giles in return said he didn't have to hold a veteran over a year, he could kick them out if he wanted to.

Q. Did you go back to Columbia Studios at any time after April 3rd?

A. I believe it was on the 5th I went after my check.

Q. Who did you see?

A. I saw Mr. Stevens over there and didn't say much.

Q. Did you see or talk with anyone else representing the company? [426]

A. No. After I got my check I went into the time office to get an availability slip stating why I was terminated and they wouldn't give it to me, and that was all.

Q. Whom did you ask?

A. Some blonde young lady in there. I don't know who she was.

Q. One of the office girls?

A. One of the office girls.

(Testimony of Joseph P. Cuccia.)

Q. Are you still in good standing in Local 727?

A. Yes, I am.

Q. Have you always been a member in good standing ever since you first joined that local?

A. Yes, I have.

Q. Did you ever receive any request from Columbia Studios since April 3rd, 1945, to return to work?

A. No, I haven't.

Q. Have you been ready and willing and able to go back to work at your former job?

A. Yes, I have.

Q. Are you now willing to go back there to your old job?

A. Yes, I am.

Mr. Rissman: That's all.

Cross-Examination

By Mr. Mitchell:

Q. Did you ever make application to go back to your old job?

A. Yes, I talked to Mr. Stevens. [427]

Q. When?

A. I believe it was some time in November of 1945, right after the strike. It might be the first part of December. I don't remember the exact date.

Q. Who else was there?

A. I don't remember if I was alone or I had some fellow with me. I think I might have been alone.

Q. What did you say to him?

A. I asked him if I could come back and he

(Testimony of Joseph P. Cuccia.)

says it was out of his hands and he didn't know what to say or what to do for me.

Q. Was that the last conversation you had with him?

A. No, I went back again in June, I think it was. I went back and asked him for my job again and he said it was out of his hands and he would go up before the front office and see what he could do and would call me up. I didn't wait for his call. I called him back and he didn't know what to say or do, it was just completely out of his hands.

Q. Did you get an availability certificate in April, 1945, or didn't you? A. Yes, I did.

* * *

Q. (By Mr. Mitchell): Let's get this clear. On April 3rd—just answer my questions now—we start in in the morning. You came to work at what time? A. 6:00 o'clock in the morning.

Q. And where did you report?

A. Right on Stage 1.

Q. And what did you do commencing at 6:00 o'clock?

A. I cleaned up the stage and got it ready for the company to come in and to shoot.

Q. Under whoes direction were you working?

A. Under Vern Woodland.

Q. All right, now, what did you do next after you got Stage 1 cleaned up ready for shooting?

A. The company come in and we closed the door and they started rehearsing, and at 10:00

(Testimony of Joseph P. Cuccia.)

o'clock in the morning I got a call from Vern Woodland to report to Dave Vail and go painting.

Q. Just a minute, was this call over the telephone? A. Yes, sir. [430]

Q. Just as near as you can remember, what did Mr. Woodland say to you?

A. "This is Joe?" I said, "Yes." He said, "Report to Dave Vail and start painting."

Q. What did you say?

A. I said no, that I would not come, and I hung up, and he said, "Be down at the office."

Q. Before you hung up you told him you would be down to the office? A. That is right.

Q. Was he down to the office?

A. He was outside.

Q. What office are you talking about?

A. The labor shack, the labor office.

Q. All right. Did you then go down to the office? A. Yes, I did. I walked in.

Q. And who was there?

A. Tom Stevens and his secretary, and that is about all that was inside there.

Q. Was Mr. Woodland there?

A. No, he was outside.

Q. Who did you speak to, if anybody?

A. I spoke to Woodland outside. I says, "I can't paint," and he just shrugged his shoulders as if to say, "There is nothing I can do for you." And then he says, "You had better go in the office."

Q. All right. Who did you see when you went in the office? A. I saw Tom Stevens there.

Q. Did you have any discussion with him at all?

A. No, I didn't. He just said, "Here is your time card, this is it."

Q. And he gave you a time card?

A. Yes, my regular morning card to go punch out.

Q. Did he give you anything else?

A. He gave me a little yellow availability slip.

* * *

Q. (By Mr. Mitchell): All right. Now, you say you got a yellow availability ticket on April 3, 1945, given to you by Mr. Stevens?

A. Yes, sir.

Q. Then what did you do?

A. Punched in my card, and left the lot and went on home. [434]

* * *

Q. All right. After the strike did you work anywhere? A. No, I did not.

Q. Did you try to work anywhere?

A. No, I did not.

Q. Are you working now?

A. I am living on my \$20.00 a week right now.

Q. And has that been so ever since the end of the strike? A. No, it just started.

Q. Well, let us start at the end of the strike. Did you work anywhere after the end of the strike?

A. No. I was still in the trucking business at the end of the strike.

(Testimony of Joseph P. Cuccia.)

Q. All right. How long did you remain in the trucking business?

A. I think the latter part of February.

Q. 1946? A. 1946.

Q. All right. Then did you work anywhere after the latter part of February, 1946?

A. No, I didn't then.

Q. Did you try to get work anywhere?

A. I have been trying to go back to Columbia, yes.

Q. Did you try to get work anywhere else?

A. No, I didn't. [442]

* * *

Redirect Examination

By Mr. Rissman:

Q. Were you ever asked to clean paint pots in April, 1945? A. I was not.

Q. Prior to the strike, by what employees were paint pots cleaned?

A. Prior to the strike, to my knowledge, they had an old man in there that was serving as an apprentice, but I believe he belonged to the Local 724, and they always done that work. They never let 727 boys anywhere near the paint shop.

Q. This Local No. 724, what is that?

A. They are another labor organization. They have got two labor organizations at the studios.

Mr. Luddy: Not affiliated with I.A.T.S.E.?

The Witness: No, sir. [445]

* * *

CARL H. GIDLUND

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. Carl H. Gidlund.

Q. Were you employed at Warner Bros., Mr. Gidlund?

A. I was.

Q. When were you employed there?

A. I started working for Warner Bros. in November of 1929.

Q. And in what capacity?

A. In the sheet metal shop as a sheet metal worker.

Q. How long did you work in the sheet metal shop?

A. Well, I wouldn't say continuously but during slow spells I was laid off, but from 1929 until 1943, I believe, when I was transferred to the prop shop.

Q. During the time that you worked in the sheet metal shop up until 1943, were you a member of any labor organization?

A. Yes, I carried an International Alliance 37 card and when that was dissolved I became a member of I.A. Local 44.

Q. At the time you worked in the studios were

(Testimony of Carl H. Gidlund.)

you ever a member of any organization other than the I.A.T.S.E.? A. Never.

Q. How long did you continue to work for Warner Bros?

A. Until my service was terminated at the beginning of the strike.

Q. Do you recall the date on which your services were terminated?

A. I believe it was March the 19th. I have the discharge slip.

Q. You have a blue slip there?

A. Yes, I have a blue slip.

Q. And what is the date on the blue slip?

A. March 19th, 1945.

Q. Referring to the blue slip, what is typewritten after the word "occupation"?

A. "Prop maker."

Q. And after "department"?

A. "Technical."

Q. What is your rate, as indicated on that slip?

A. The rate as indicated on the slip was \$1.71.

Q. And what is typewritten after the printed word "remarks"?

A. "Refused to do carpenter work."

Q. By whom is the blue slip signed? [448]

A. F. C. Fuhrmann.

Mr. Rissman: Mr. Mitchell, do you want to examine the blue slip? He has been reading from it.

Mr. Mitchell: That is all right.

Q. (By Mr. Rissman): After you were trans-

(Testimony of Carl H. Gidlund.)

ferred into the prop shop, what kind of work did you do there? A. Sheet metal work.

Q. Can you describe some of the work you did in the prop shop?

A. At the time I transferred in there, the prop shop had just started to build a bomber, and when I went in there Mr. Gibbons called me in the office and said he was turning all the sheet metal work on the bomber over to me, and I would have charge of it and take the work out to the sheet metal shop and supervise the construction and the installation of all the sheet metal work in the bomber. And along with that there were other sheet metal jobs. At the time of my termination we were working on a mechanical horse. I handled all the metal work, or a lot of metal work on that, and different metal work on sets.

Q. Do you have your own tools that you use while working in the studio?

A. I own sheet metal tools, yes.

Q. Do you have any other type of tools?

A. Referring to carpenter tools, I have never carried any carpenter tools in my box in all the years I have worked at the studio. [449]

Q. Did you ever work in the carpenter shop as a carpenter? A. I never did.

Q. Or in the mill? A. I never did.

Q. Under whose supervision did you work while you were working in the prop shop?

A. Under Gus White.

Q. Prior to the strike of March, 1945, did you

(Testimony of Carl H. Gidlund.)

ever refuse to do any work that was assigned to you? A. No, none; not at all, never.

Q. Were you ever asked to go to work in the carpenter shop? A. Prior to the strike, no.

Q. Prior to the strike were you ever asked to do any type of carpenter work?

A. No, I was not.

Q. From 1943 until the time of your discharge on March 19, 1945, were you ever laid off?

A. No.

Q. Did you work on March 12, 1945, the day on which the strike started? A. No, I did not.

Q. When did you go to work after that?

A. I believe it was on Wednesday following the call of the strike. [450]

Q. That would be March 14?

A. I believe that was it, yes.

Q. When you went back to work on March 14, what kind of work did you do?

A. Metal work.

* * *

Q. Did Mr. Fuhrmann come in?

A. He did.

Q. What did he say?

A. He asked us if we were willing to go in and do carpenter work and we refused.

Q. Why did you refuse?

A. Well, there were several reasons. My reason—one of my reasons was that I had never done carpenter work and never, as I said before, never carried any carpenter tools. I had done nothing

(Testimony of Carl H. Gidlund.)

but sheet metal work and other prop making work in the studios, and another reason was that I didn't want to be a strike breaker or a scab. [455]

* * *

Q. Did Mr. Fuhrmann say anything to you when you told him you would not do carpenter work?

A. Yes, he said, "Well, I'm sorry, boys. That's it." And turned around and walked out.

Q. Did you leave the studio then on that day?

A. Yes, I did.

Q. Did you ever come back to the studio after that?

A. Yes, I went in to get my tools.

Q. When did you go in for your tools?

A. We had a meeting at Mr. Peck's house and I believe it was the morning after that I went in to get my tools.

Q. Did you attend any meeting at the studios on the night or evening of March 19th?

A. I did.

Q. Was Mr. Fuhrmann present at that meeting?

A. Yes, he was.

Q. What occurred at that meeting in the evening?

A. Well, mainly Mr. Fuhrmann or Mr. DuVal was telling the boys that they would have to go in and do anything and everything that the International wanted us to do to keep the studio going and the discussion became pretty heated and some of the boys in discussing with Mr. DuVal asked what would [456] happen if they refused and at one time he said that if we refused to do the things

(Testimony of Carl H. Gidlund.)

that we were asked to do that our cards would be taken away from us and that we would never work in the motion picture industry again. [457]

* * *

Q. Did you ever go back to work at Warner Bros. after March 19th? A. No, I never did.

Q. Did you ever try to get your job there again?

A. Yes, I did.

Q. When?

A. At the end of the strike I called Mr. Gibbons' office in the prop shop and he was out and I talked to Mr. Peck who I understood was in charge of the department under Mr. Gibbons [458] at the time and he said things were just the same as they were before, that we would have to wait for a call. And I also called Mr. Fuhrmann's office and got the same story from there, that I'd just have to wait for a call. [459]

* * *

Q. (By Mr. Rissmann): Were you in good standing in the I.A.T.S.E. in October and November of 1945? A. I was.

Q. And on March 19th, 1945? A. I was.

Q. After March 19th, 1945, were you ready and willing to go back to your prop making job at Warner Bros.? A. Yes, sir.

Q. Are you still willing to go back to that job?

A. I am.

Mr. Rissmann: That's all.

Trial Examiner Riemer: Mr. Mitchell?

(Testimony of Carl H. Gidlund.)

Cross-Examination

By Mr. Mitchell:

Q. Have you been working since October 31, 1945?

A. October 31—yes, I have been. I have been working fairly steady.

Q. You have been working fairly steady?

A. Yes.

Q. At studios other than this Eagle-Lyons Studio?

A. Eagle-Lyons Studio wasn't in existence at that time, I [460] don't think. It was a P.R.C. studio and an independent studio was operating on the P.R.C. lot and I worked there for a time.

Q. Did you work during the period of the strike?

A. I did for a short time, yes.

Q. In some studio?

A. Yes.

Q. Which one?

A. Monogram Studio.

Q. And then since the end of the strike you have been working, you say, fairly steadily in studios?

A. That's right.

Q. In sheet metal work of some sort?

A. Metal work only.

Q. What kind of a card do you hold to work?

A. At the present time?

Q. Yes.

A. I don't hold a card. I have been working on a permit.

Q. From what union?

A. I.B.E.W., International Brotherhood of Electrical Workers, Local 40.

(Testimony of Carl H. Gidlund.)

Q. That is, under the I.B.E.W. you have been working since the end of the strike?

A. That's right—not all the time, just since my card was taken away in the I.A. [461]

Q. Well then, prior to that time, were you working under your I.A. card? A. That's right.

Q. In prop shops?

A. In special effects and prop shops, yes.

Q. In those other studios you spoke of?

A. That's right.

Q. How did you get your jobs in those other studios under your I.A. card?

A. By the different fellows I had worked with at Warner Bros. calling me.

Q. Did you sign any I.A. Local 44 call book?

A. I did not, I never have.

Q. Were you present at the meeting on March 13th, 1945, across the street from the studio when Mr. DuVal read a telegram from Richard Walsh dated March 12th, 1945, directing I.A.T.S.E. men to cross picket lines? A. Yes, I was.

Q. Showing you Respondents' Exhibit No. 3, did you see that or a copy of it at or about March 13th, 1945?

A. Yes, I believe I have seen it before on or around that time. [462]

* * *

Q. Did you attend the meeting at the Women's Club on March 18, 1945? A. I did.

Q. What did Mr. Richard Walsh say with respect to crossing jurisdictional lines or doing carpenter work?

(Testimony of Carl H. Gidlund.)

A. I don't recall that he said anything about doing carpentry work. He didn't specify, I don't think, carpenter work. I think he said that the I.A. men would have to go in and do anything and everything that was in their power to keep the studios in operation.

Q. And to do whatever work the studios assigned to them? A. That's right.

Q. That is what he told you?

A. Well, I wouldn't say to do whatever work the studio assigned to us or whether the business agent or the union was telling us to do it.

Q. Were you present at the meeting in the mill at Warner Bros. on March 19th when Mr. Brewer talked to you about doing work other than prop makers' work? A. I was.

Q. What did he say about it?

A. Well, it was about the same thing, that the International, the I.A. was insisting that the men go in and do carpenter work, painting, and anything and everything to keep the studios in operation. [463]

* * *

Q. You were, however, present in the evening at 6:30 on the 19th when Mr. DuVal and Mr. Fuhrmann was there? A. I was there, yes.

Q. Was anything said about withdrawing or tearing up the blue slips if you men would go back to work?

A. I believe there was something mentioned about the blue slips, that the blue slips would be

(Testimony of Carl H. Gidlund.)

void if the men would go in and do the work.

Q. And by that, what work?

A. Do carpenter work, as they had asked us to do, what we had been discharged for. [464]

* * *

Q. During the period of the strike were you ready and willing to go back to Warner Bros. and do carpenter work if directed by Warner Bros.?

A. Not do carpenter work, no, because I had never done carpenter work. I had never carried carpenter's tools. [465]

Q. Well, regardless of the reason were you willing to go back and do carpenter work if somebody would furnish you a hammer to work with?

A. I was willing to go back and do prop making work only, and not as a carpenter. [466]

* * *

DONALD MacKELLAR

called as a witness by and on behalf of the National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. Donald MacKellar.

Q. Prior to the strike of 1945, were you employed at Warner Bros.? A. I was.

Q. How long did you work there?

A. About seven months.

(Testimony of Donald MacKellar.)

Q. And what kind of work did you do?

A. Prop work.

Trial Examiner Riemer: I can't hear you, Mr. MacKellar.

The Witness: Prop work.

Q. (By Mr. Rissman): Under whom did you work?

A. Directly under James Gibbons, Mr. White, and Mr. Sapp.

Q. What kind of work did you do under those people?

A. Well, most of my time was doing plastic work, making plastic cups and saucers for Jack Benny pictures.

Q. Are you referring to the large cup that was used in that picture?

A. Yes. We made a large one, we made a small one,—we made three different sizes. [524]

Q. What size were they?

A. The smallest one was probably about, oh, seven inches.

Q. And the largest?

A. The next was probably about two feet, and then the great big cup that Mr. Sapp spoke about was big enough to drown a man in.

Q. And that was made of a plastic material?

A. Plastic, yes. [525]

Q. How long have you been in the motion picture industry?

A. Oh, I started when they made the first Hunchback of Notre Dame at Universal. That must have been 22 or 23 years ago.

(Testimony of Donald MacKellar.)

Q. Have you always been a prop maker?

A. Yes, I started in making props.

Q. Have you specialized in any particular kind of props? A. No. They all come as props.

Q. Have you worked on miniatures?

A. Oh, yes.

Q. As well as big ones? A. Oh, yes.

Q. Have you done more work on miniatures than other types?

A. I have dressed many miniature sets.

Q. When you were working at Warner Bros. before the strike, were you a member of any labor organization?

A. I was a member of the I.A.T.S.E.

Q. Which local? A. 44.

Q. How long have you been a member of Local 44? A. Since it started. [526]

* * *

Q. Did you work on March 12 and 13, 1945, the first two days of the strike?

A. The first two days of the strike? No, I didn't.

Q. Did you come to work on March 14th?

A. Yes.

Q. And how long did you continue working after that?

A. Until they fired me on the 19th.

Q. Did you get a blue slip?

A. Yes. I have it here.

Q. Will you refer to it, please? What is the date on your [527] blue slip? A. 3/19/45.

(Testimony of Donald MacKellar.)

Q. And what does it state as your occupation?

A. Prop maker.

Q. In what department? A. Technical.

Q. What is typewritten after the printed word
"Remarks"?

A. "Refused to do carpenter work."

Q. By whom is the blue slip signed?

A. Mr. Fuhrmann.

Mr. Rissman: Mr. Mitchell, do you want to see
the blue slip from which the witness has been read-
ing?

Mr. Mitchell: No.

The Witness: I guess you have seen plenty of
them.

Mr. Mitchell: What is the rate of pay?

The Witness: \$1.95.

Mr. Mitchell: No, I don't want to look at it.

Mr. Rissman: Thank you.

Q. (By Mr. Rissman): When did you get that
blue slip?

A. On the 19th, the end of the shift.

Q. On March 19, 1945, did you attend a meeting
that was addressed by Mr. Roy Brewer in the
studio? A. I did.

Q. And did you attend the meeting that was
addressed by Mr. Fuhrmann on that day? [528]

A. I did. [529]

* * *

Q. (By Mr. Rissman): Did you work after
March 19, 1945, at the Warner Bros. Studios?

A. No, not until two or three weeks ago.

(Testimony of Donald MacKellar.)

Q. Well, did you work at any time during the strike? A. No. Oh, no.

Q. After the strike did you try to get your job back?

A. I did. I called up Mr. Gibbons, and he said he wasn't hiring or firing, I would have to see Mr. Fuhrmann.

Q. Did you see Mr. Fuhrmann?

A. No. I tried, and he was always out. I tried about six times, and I couldn't get hold of him, and I quit trying.

Q. Did you ever go back to Warner Bros.?

A. Yes, I did, about—let's see, I have been away from there now about three weeks. I was there for about a month.

Q. In other words, you went back and worked there about seven weeks ago? A. Yes.

Q. That would be some time after the first of August? A. In around there.

Q. And how did you get your job at that time?

A. Through the union.

Q. Are you still a member in good standing of the union? A. Yes.

Q. What kind of work did you do when you went back there? A. Prop work. [530]

Q. Are you working there now? A. No.

Q. How long have you been out?

A. From there?

Q. Yes. A. About three weeks.

Q. And what was the reason you are not working there now?

(Testimony of Donald MacKellar.)

A. Well, when we thought there was a strike going to come along, Jimmie Gibbons called all of the boys up to the penthouse, but I was told I wasn't wanted there, so I went into Jimmie's office and asked Jimmie, "What is wrong, why am I not wanted up there?"

He said, "Well, you are not one of us, Don. Go back to the end of the shop and sharpen your tools or anything you want."

And I said, "Well, Jimmie, if I am one of the boys that is not wanted, I will take my tools and go, because I can't work under those conditions."

So I packed my tools and went.

Mr. Rissman: That's all.

Cross-Examination

By Mr. Mitchell:

Q. When was it you left Warner Bros. last?

A. Last, just about a few weeks ago.

Q. You weren't discharged? [531] A. No.

Q. You weren't laid off? A. No.

* * *

Q. After the strike, after talking with Mr. Gibbons, did [532] you attempt to get a job anywhere else?

A. I went to the union and the union gave me a job.

Q. The union gave you a job? A. Yes.

Q. When did the union give you your first job?

(Testimony of Donald MacKellar.)

A. Oh, about three months after the strike, something like that.

Q. Three months after the end of the strike?

A. Yes.

Q. Well, when did you first go to the union to get a job?

A. Just about that time because I wasn't bothering about—I was still busy with my own house and wasn't bothering much.

Q. Well, you didn't bother about getting a job for three months after the strike, is that it?

A. Oh, I guess I went down to the union. I just didn't get a job, that was all. That was all right and I went back home and kept working on my house. Finally I went down there one day and I said, "Can I go to work now and work in the studio?"

"Yes, you can go back to work in the studio," and I got a job.

Q. During this three months' period you say you were working on your house?

A. Yes, I was redoing it.

Q. Doing some building work on it, you mean?

A. No, some stucco work on it and fixing up my shingles and stuff like that.

Q. When was the first time that you signed the union call book after the strike?

A. Well, to tell you the truth I haven't signed it yet. I just asked them over the telephone when I got the job.

Q. When was the first time that you asked them over the telephone to put you on a job?

(Testimony of Donald MacKellar.)

A. I can't remember the dates at all. That is one thing I am very, very bad at doing, remembering dates.

Q. Who did you talk to?

A. I talked to the call boy.

Q. Was it one month, two months, three months after the end of the strike?

A. Well, I guess I asked them around the first month but then you know, feelings were still a little bit high and that was that.

Q. Where did you go for your first job after the end of the strike? A. Columbia.

Q. And have you worked there since that time?

A. I worked for Columbia Studios seven months. That is all I have worked for Columbia.

Q. Seven months? A. Yes. [534]

Q. Then did you take another job?

A. That was the time I got the job at Warner, after I worked at Columbia.

Q. After you got through at Columbia, you went over to Warners and worked there?

A. Yes, for about four weeks, something like that.

Q. And then you quit Warners?

A. Then I quit at Warners.

Q. Are you working now?

A. I am working at Monogram.

Q. Have you been working at Monogram since you quit Warners?

A. I am still working there.

Q. In the prop making department?

(Testimony of Donald MacKellar.)

A. Prop making department. [535]

* * *

Cross-Examination

By Mr. Luddy:

* * *

Q. Were you at any meeting at all of any prop makers that Mr. Brewer or Mr. DuVal spoke at?

A. Yes, I was at the meeting in the mill that morning.

Q. You heard Mr. Brewer state that Mr. Walsh had ordered the men to go through jurisdictional lines and do any work they were capable of doing?

A. Yes. [536]

* * *

Recross-Examination

By Mr. Mitchell:

Q. Would you have been willing between March 19, 1945, and October 31, 1945, to come back to Warner Bros. as an employee and do carpenter work as directed? A. No. [539]

* * *

GEORGE I. GROTH

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Would you state your name, please?

(Testimony of George I. Groth.)

A. George I. Groth.

Q. Where do you live, Mr. Groth?

A. Hollywood district, Hudson Avenue, 809½
North Hudson, Zone 38.

Q. Were you employed by Loew's, Incorporated,
at any time? A. Yes.

Q. When did you work there?

A. From January 29, 1942, through March 22,
1945.

Q. And in what capacity were you employed?

A. Labor gang, labor.

Q. Who was your immediate superior when you
were working on the labor gang?

A. Herbert Schuetze.

Q. What is his title or his job?

A. Superintendent of—he is just the supreme
gang boss of all laborers on the lot. I just don't
know what title he [545] does have.

Q. Were you a member of any labor organiza-
tion during the time you worked at Loew's?

A. Yes.

Q. What? A. Local 727, I.A.T.S.E.

Q. How long were you a member of that local?

A. December 12, 1942. I worked on a permit
for six months.

Q. And then you became a regular member?

A. Regular member.

Q. Were you ever a member of any other labor
organization while working in the studios?

A. No.

(Testimony of George I. Groth.)

Q. Did you go to work on March 12, 1945, the first day that the strike began?

A. I drove out to the studio but I didn't go in.

Q. Did you go to work on the second day?

A. No.

Q. When was the first time after March 12 that you went to work?

A. Wednesday, March 14th.

Q. When was the last time that you worked at Loew's? A. March 22nd.

Q. On March 22nd what kind of work were you doing in the morning? [546]

A. Laborer, cleaning catwalks.

Trial Examiner Riemer: Cleaning what?

The Witness: Catwalks, the runways high.

Q. (By Mr. Rissman): Were you asked to do any other work on that day? A. Yes.

Q. By whom?

A. Leo, special effects foreman.

Q. Do you know his last name?

A. I don't know his last name.

Mr. Mitchell: What did he say his first name was?

Mr. Rissman: Leo.

Q. (By Mr. Rissman): Where was Leo working at the time? A. Stage 19.

Q. Where were you working at cleaning these catwalks? A. I had been on 23.

Q. How did you happen to get over to Stage 19 if you were working on 23?

(Testimony of George I. Groth.)

A. We were called over by a pusher.

Q. Which one? A. Ted Busse.

Q. Is that B-u-s-s-e?

A. Ted Busse and Jim Fallon, there is two of them.

Q. What kind of work did Leo ask you to do?

A. Work that the painters had been doing. [547]

Q. What kind of work was it?

A. Well, more or less puttying up holes and cracks with a broad knife and a handful of putty.

Q. And did you do it?

A. Some, but I didn't use the broad knife. I just stuck them full with my fingers.

Mr. Rissman: May I have the answer read?

Trial Examiner Riemer: Will you read the answer?

(The answer was read.)

Q. (By Mr. Rissman): How long did you continue to do that work?

A. Oh, a very short time, less than 30 minutes I would say.

Q. While you were working there doing that work, did you have occasion to see your time card?

A. Yes, I seen it. I did.

Q. How and where?

A. I slipped out to the card rack where our cards were deposited.

Q. Yes, and did you look at your card?

A. I did.

Q. Was it different than it had been before?

(Testimony of George I. Groth.)

A. It had the blue stamp on it where the rate had been changed.

Q. From what to what?

A. From laborer work to painter's rate. [548]

Q. Did you go back to your regular work at any time after that? A. I went to Stage 19.

Q. When? A. Immediately.

Q. Did you have any conversation with anybody there? A. No.

Q. What did you do on Stage 19?

A. I just stalled and took 20 minutes off to clean up, because it was 4:30, near 4:30.

Q. Did you come to work the next day?

A. Yes.

Q. Where did you go to work?

A. We were sent to do the same work.

Q. Who sent you? A. Herb Schuetze.

Q. Did you have any conversation with him when he sent you to do that work?

A. No, I had none then.

Q. Did you go to do it?

A. I refused to paint.

Q. Did you tell Schuetze that?

A. Later.

Q. When he sent you to do the painting, what did you do?

A. I reported at the leather room for Stage 10, where they [549] were assembling everybody who were expected to paint.

Q. And did you go to paint?

(Testimony of George I. Groth.)

A. No, I didn't.

Q. Did you talk to anyone other than Herb Schuetze?

A. Well, not right at that time I didn't.

Q. Did anyone else refuse to paint?

A. There were three or four of us.

* * *

Q. (By Mr. Rissman): Did you have any conversation with Schuetze on that day?

A. A short one, told him I just believed I would go home.

* * *

Q. (By Mr. Rissman): Was it before or after you were asked to paint that you told Schuetze you thought you would go home?

A. It was after I refused to paint. [550]

* * *

Q. (By Mr. Rissman): This is March 23rd that you are talking about, isn't it?

A. March 23rd.

Q. 1945? A. 1945.

Q. What time did you come to work that morning? A. Shortly before 8:00.

Q. Was your regular starting time 8:00 o'clock?

A. 8:00 o'clock.

Q. Where did you report to work?

A. In the labor room, labor office.

Q. Is that where you usually reported?

A. Yes.

(Testimony of George I. Groth.)

Q. And were you assigned to work any place that morning?

A. He called for—I was sent to the leather room near Stage 10.

Q. What is the ladder room? [551]

A. It is leather, l-e-a-t-h-e-r, leather goods.

Q. What is that room?

A. It is just a small leanto on Stage 10 before you go through the main door into Stage 10.

Q. Who sent you there?

A. Herb Schuetze.

Q. Did he send anybody else there with you?

A. Yes.

Q. How many other people?

A. My guess would be near 20.

Q. Did you go to the leather room?

A. Yes.

Q. When you got there, who else was there in addition to these other workers that were sent with you?

A. There was Jim Fallon.

Q. Who is Jim Fallon?

A. Just call him a pusher.

Q. Pusher? A. Pusher.

Q. Was there any other foreman or pusher or straw boss there? A. Leo.

Q. Is that the same man you testified to before?

A. Yes.

Q. Were you asked to do any work when you got to that [552] leather room near Stage 10?

A. They were all—we were all handed brushes if we would take them.

(Testimony of George I. Groth.)

Q. What kind of brushes?

A. Paint brushes and painters' tools.

Q. By whom? A. By Leo.

Q. Did you take yours? A. No.

Q. Did Leo say anything to you or to the others in your presence when he handed you the brushes and painters' tools?

A. He just said, "If you don't want them, report to Schuetze."

Q. Did you take the brush? A. No.

Q. Did you say anything to Leo?

A. I just said, "I will not paint."

Q. Did you tell him why you would not paint?

A. No.

Q. Did you report to Schuetze then?

A. I did.

Q. Where did you report to him?

A. In—well, it is his office. It is the construction department.

Q. When you got there, was anybody else there besides you [553] and Schuetze?

A. There were the usual office force.

Q. Did you have any conversation with Schuetze at that time?

A. Well, very brief, if any. I don't recall. I just handed him my card.

Q. Which card?

A. The time card we punch, the time card.

Q. Did he ask you anything?

(Testimony of George I. Groth.)

A. I think he said, "Do you want to work—or don't you want to work?"

Q. What did you say?

A. I says, "Yes, but I don't want to paint."

Q. Did he ask you why you didn't want to paint?

A. No.

Q. Did you tell him? A. No.

Q. What happened after you handed him the card and had that conversation with him?

A. Well, there were three or four of us started to leave by the south gate.

Q. Go ahead.

A. And the policeman sent us back to Gabourie's office, Fred Gabourie.

Q. Who is Fred Gabourie? [554]

A. I think his classification is superintendent of construction.

Mr. Rissman: Mr. Mitchell, is that G-a-b-o-u-r-i-e?

Mr. Mitchell: That is correct.

Q. (By Mr. Rissman): Did you go to see Fred Gabourie? A. Several of us—I did.

Q. Where did you see him?

A. In his office.

Q. Did you have any conversation with him?

A. There was a discussion.

Q. Tell us what was said.

A. In regards to painting, and we were told if we could not paint, that they were going to make pictures regardless, "if you can't paint, we can't pay you."

(Testimony of George I. Groth.)

Q. Did you say anything? A. No.

Q. Did you leave the studio then?

A. I did.

Q. Now, prior to the strike, before the strike of March 19, 1945, did you ever work with any of the painters at the studio?

A. No, not on the paint gang.

Q. Had you ever done any painting of any kind?

A. Never.

Q. Had you ever done any of this work of filling holes or [555] cracks with putty that you described?

A. No.

Q. Had you ever been asked to do any of that work before the strike? A. Never. [556]

* * *

Q. Did you ever tell Herbert Schuetze or this formen, Leo, whose last name you don't remember, why you didn't want to paint?

A. I don't believe I told them why. I just told them I wouldn't. [557]

* * *

Q. Before the end of the strike did you ask the union, your Local 727 of the I.A.T.S.E., to get you a job?

A. I didn't ask the union at that time. I telephoned the studio.

Q. During the strike or after the strike?

A. On November 3 following the strike.

Q. That is November 3, 1945? A. 1945.

Q. And with whom did you talk?

A. Herb Schuetze.

(Testimony of George I. Groth.)

Q. What conversation did you have with him on that day?

A. He asked me where I had been, and I says, "Why, I have been off."

He says, "As far as I am concerned, you are still off," and hung up. [561]

* * *

Q. Did you ever get back to work at Loew's?

A. Never did.

Q. And are you still a paid-up member of Local 727?

A. I am.

Q. As far as you know, you are in good standing?

A. As far as I know.

Q. Are you working now?

A. I am.

Q. Where?

A. Hal Roach.

Q. Hal Roach Studios?

A. Hal Roach Studios.

Q. And what kind of work are you doing there?

A. Labor.

Q. And are you working under a 727 card?

A. Under a 727 card.

Q. When did you start to work at the Hal Roach Studios?

A. March 9, 1946.

Q. At the present time are you willing to go back to Loew's to your former job as a laborer?

A. Not unless I would have to. I like Hal Roach's much better. [564]

* * *

Q. You say that you called Mr. Schuetze on November 3, 1945?

(Testimony of George I. Groth.)

A. Saturday morning, November 3.

Q. How do you fix that date?

A. Why, I marked it on my calendar.

Q. Just give me the conversation that you had with Mr. Schuetze over the telephone, starting at the beginning of it, [566] as nearly as you recollect.

Q. I said, "This is George Groth."

"Well, how are you? Where in hell have you been?"

"I have been off."

"Well, as far as I am concerned, you are still off."

And that was all. [567]

* * *

Q. Did you know that during March, 1945, the I.A.T.S.E. was directing its members to do whatever work the studios required—

A. I surely did.

Q. —in order to keep open?

A. I surely did.

* * *

JOHN L. SELGRATH

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. John L. Selgrath.

Q. Mr. Selgrath, were you ever employed at

(Testimony of John L. Selgrath.)

Loew's, [569] Incorporated, or what is known as the M.G.M. Studios?

A. I have been on the payroll the last time since March, 1931.

Q. How long were you employed there altogether? A. About twenty years.

Q. You say the last time since March, 1931. Were you off for any period before that?

A. Three days.

Q. What was that? A. Three days.

Q. When was that?

A. That was in March, in 1931.

Q. And how long did you continue to work there after March, 1931?

A. Until March 23, 1945.

Q. Between March, 1931, and March 23, 1945, were you ever laid off? A. No.

Q. Did you ever lose any time there for any reason in that period?

A. I was loaned out to another studio.

Q. When was that? A. 1941, I believe.

Q. To what studio? A. Selznick. [570]

Q. How long were you at Selznick's?

A. For two weeks.

Q. Then did you go back to M.G.M.?

A. Yes, sir.

Q. Did you ever work any place else in that period between March, 1931, and March, 1945?

A. No.

Q. What was your work at M.G.M. when you were last employed there?

(Testimony of John L. Selgrath.)

A. I was a key grip.

Trial Examiner Riemer: This is going to be a little confusing if you refer to Loew's——

Mr. Rissman: Loew's, Inc., is the correct corporate name of the respondent. It is known as the M.G.M. Studio. Is that correct, Mr. Mitchell?

Mr. Mitchell: That is true.

Mr. Rissman: The employees know it as M.G.M., but it is Loew's, Inc.

Trial Examiner Riemer: Go ahead.

Q. (By Mr. Rissman): What is the work of a key grip?

A. He is assigned to a cameraman, and we go out on production, and we supervise the moving of walls, setting up and using reflectors on the exterior sets, putting in tracks for the cameras to go along on the dolly.

Q. How long were you employed as a key grip?

A. From July, 1933.

Q. Until——

A. In 1933 we were assigned to companies as standby carpenters, and we were under a different union organization; and then in 1936 we were known as grips.

Q. After 1936 of what union were you a member? A. Local 37.

Q. Of the I.A.T.S.E.?

A. That is right.

Q. How long did you continue to remain a member of Local 37?

A. Until we were assigned over to Local 80.

(Testimony of John L. Selgrath.)

Q. And when was that, approximately?

A. I couldn't say.

Q. Do you recall it as some time in about 1937?

Mr. Mitchell: 1939.

The Witness: 1939, I believe.

Q. (By Mr. Rissman): 1939? A. Yes.

Q. And you went automatically from one local, from one local to another? A. That is right.

Q. How long did you remain a member of Local 80?

A. I am still a member of Local 80.

Q. Still in good standing? [572]

A. Yes, sir.

Q. Still paid up? A. That is right.

Q. Who was your boss while you were working as a grip? A. Andy McDonald.

Q. What is his title? A. Grip foreman.

Q. Directing your attention to March 23, 1945, did you work on that day?

A. Yes. Yes, on the 23rd I worked.

Q. And what kind of work did you do on that day? A. I was on a standby with a company.

Q. That was your regular work?

A. Grip work, that is right.

Q. Were you asked to do any other work on that day? A. No, I was not.

Q. Well, were you ever asked to do any other work other than your regular work as a grip in March, 1945? A. Yes.

Q. When? A. The 24th.

(Testimony of John L. Selgrath.)

Q. Who asked you?

A. I was assigned to go to Stage 29 to do carpenter work.

Q. Who assigned you to that?

A. Mr. McDonald. [573]

Q. What did he say and what did you say?

A. I asked him what kind of work it was, and he told me it was carpenter work, so I told him I wouldn't do it. I asked him what I should do, and he told me to report to Mr. Barrett at Local 80.

Q. And is that William Barrett, the business representative of Local 80?

A. That is right.

Q. Did you tell Mr. McDonald why you wouldn't do carpenter work?

A. Yes, I think I told him the day before, when the argument started.

Q. And did you have any discussion with Mr. McDonald at any time before March 24 about doing work other than grip's work?

A. Just on the 23rd. [574]

Q. What conversation did you have with him on the 23rd and where was it?

Mr. Luddy: Now, if that question is asked for the purpose of eliciting from this witness the reason as to why he would not do carpenter work, I want to make an objection. If counsel assures me it is not what he has in mind, then I won't encumber the record with the objection now.

Trial Examiner Riemer: Why don't you wait

(Testimony of John L. Selgrath.)

until the exact question is presented, then you will be ready to make your objection, Mr. Luddy. I don't know what the purpose of the question is. Do you have the question? What is it?

(The question was read.)

Trial Examiner Riemer: Go ahead, Mr. Rissman.

The Witness: Answer?

Trial Examiner Riemer: Yes.

The Witness: I went to work on the 23rd of March and there were four boys standing there who used to be my assistants, second men, so they were telling me that they would not do any carpenter work, because the previous day there were some men there who refused to do it and they went out and they were assigned to take those men's jobs that day, and there was one of them then was a second man on another outfit, so I waited until Andy came and asked him about it.

Q. (By Mr. Rissman): By Andy you mean Andy MacDonald? A. Yes. [575]

Q. All right.

A. And I said, "Andy, how does it come that these men have been assigned to the companies, regular companies, doing the work of men, you let them refuse the carpenter work and they are in their place and these men and myself that worked on companies, these man are standing here doing nothing. I don't think that is right."

So Andy, we talked it over for a while and he said, "Well, John, I am going to send them back

(Testimony of John L. Selgrath.)

to the office." So he asked them to go back to the office, and myself, I went out on the company, and then I didn't see Andy, Mr. MacDonald, any more that day until the next morning when I came in I was assigned to do carpenter work, and there was no argument between Mr. MacDonald and myself, I just asked what I should do and he told me to report to Local 80.

Q. What do you mean when you say these men were assigned to companies and the others were standing around doing nothing? What is the distinction?

A. Well, the men that had worked on the 22nd, we will say, they were assigned to a company, a regular company, there will be maybe any place from four to twelve men on a company shooting, which would be the first grip, the second grip, third grip, and then the rest they call them just the gang grips. I just happened to know Scoggins and Finch and Griffith and Day, they were all standing there, and they were [576] men who refused to do the carpenter work the day before, and was sent out on companies. Andy said he didn't believe that, if I could prove it, and I went and I got one of the boys that had told me that he had refused to do the carpenter work, Mr. Harry Fraser, and he told Mr. MacDonald that he had refused the day before.

Q. Did you go to see Mr. Barrett after Mr. MacDonald told you to?

A. I went over to see Mr. Barrett, yes.

(Testimony of John L. Selgrath.)

Q. Did you have any conversation with him?

A. There was quite an argument going on, yes, there were several grips there.

Q. Where did you see him?

A. In the Local 80 hall, Santa Monica Boulevard.

Q. Tell us what was said.

Mr. Mitchell: Objected to as being immaterial as to respondents.

Trial Examiner Riemer: The objection is overruled, but Mr. Rissman, I am not interested in hearing a long story about an argument that this witness had and conversation with Barrett. Let's hear it, but let's let the testimony be confined to that.

Mr. Rissman: Yes.

The Witness: I asked him what I should do and he said if I didn't want to do carpenter work I can call the studio, [577] call Andy MacDonald and have him fire me.

Mr. Mitchell: I move that the statement be stricken for the same reason the objection was made.

Trial Examiner Riemer: The motion to strike is denied.

Q. (By Mr. Rissman): Did you tell him you would not do carpenter work?

A. That is right.

Q. Did he ask you why?

A. No, he did not.

(Testimony of John L. Selgrath.)

Q. Did you tell him why?

A. No, I did not.

Q. While you were there did he call Mr. MacDonald?
A. He did.

Q. Did you hear his end of the conversation?

A. Told him to fire us, yes.

Q. Did you go back to the studio after that?

A. I went back that same day.

Q. At what time was this when you got back to the studio?
A. 12:30.

Q. Who did you see when you came back to the studio?
A. Mr. MacDonald.

Q. Did you have any conversation with him?

A. Asked him what he wanted to do with us.

Trial Examiner Riemer: What was that answer?

(The answer was read.) [578]

Q. (By Mr. Rissman): What did he say?

A. He said he didn't know what to do with us.

Q. Go ahead, give us the whole conversation between you and MacDonald when you came back to the studio.

A. I asked him what he wanted to do and he said, well, he had no right to fire us and he didn't know what to do with us. So I asked him if we could make arrangements to see Mr. Walsh, so he called the office and Mr. Walsh was not in. That is William R. Walsh.

Q. You are referring now to William R. Walsh, the labor relations or personnel director of Loew's Incorporated?
A. Yes.

(Testimony of John L. Selgrath.)

Q. You are not referring to Richard Walsh, who is president of the I.A.T.S.E.? A. No.

Q. Did you go to see Mr. Walsh?

A. Well, we came in then on Monday morning.

Q. On that day did you see him?

A. No, he was not there.

Q. Did you see him after that?

A. On Monday morning.

Q. This first incident, when you came back to the studio around 12:30 and had a conversation with MacDonald, that was on Saturday?

A. That was on Saturday. [579]

Q. And you could not see Walsh because he was not there, so you came in Monday, is that right?

A. That is right.

Q. Did you see Walsh on Monday?

A. We did.

Q. Who was with you?

A. Mr. Finch and Mr. Scoggins.

Q. Where did you see William R. Walsh?

A. In his office, the labor relations office.

Q. Did you have any conversation with him?

A. Yes, quite a conversation.

Q. All right, tell us what conversation you had with Mr. Walsh.

A. Well, it lasted for an hour and a half. Finally I asked him what he wanted to do with us, and he said, well, he didn't know, he didn't know what to do with us. He would not fire us and he would not lay us off.

(Testimony of John L. Selgrath.)

Q. Is that what he said?

A. That is right, so I agreed that I would go home and stay until it was over.

Trial Examiner Riemer: Will you read that answer?

(The answer was read.)

Q. (By Mr. Rissman): Do you recall anything else that you said to Mr. Walsh or that he said to you at that time?

A. No, I do not. [580]

Q. Do you recall talking to him about crossing the picket line?

A. Well, we told him that we didn't think it was right to cross—no, it was not right to take them jobs of the men that were out. I agreed with him that I would cross the picket line and do my own work.

Q. You had been crossing the picket line to do your own work ever since March 12th, hadn't you?

A. Yes, sir.

Q. Did you ever refuse to do your own work as a grip?

A. No, sir.

Q. After your conversation with Mr. Walsh on Monday, March 27th, 1945—

Mr. Mitchell: Now, wait a minute.

The Witness: The 26th.

Mr. Mitchell: If March 23rd is Saturday, which I doubt, then it is not March 27th on Monday.

Trial Examiner Riemer: Does any one have a 1945 calendar? Off the record.

(Discussion off the record.)

(Testimony of John L. Selgrath.)

Trial Examiner Riemer: On the record.

Q. (By Mr. Rissman): When you saw Mr. Walsh and had the conversation with him on Monday, March 26, 1945, did you see or talk with any other company official on that day?

A. Yes. [581]

Q. Who did you see?

A. We were in the restaurant eating when the superintendent of construction's secretary came in to tell us that Mr. Jerry Mayer wanted to see us.

Q. Jerry Mayer? A. Yes.

Q. Who is Jerry Mayer?

A. Studio manager, I believe.

Q. Did you know Mr. Mayer? A. Yes.

Q. Before that time? A. Yes.

Q. Did you go to see him? A. Yes, sir.

Q. How long was this after your conversation with Mr. Walsh?

A. Oh, I would say an hour.

Q. You were in the studio restaurant?

A. No, we was on the outside.

Q. Did you go back into the studio?

A. Yes, sir.

Q. Did you see Mr. Mayer? A. Yes, sir.

Q. Where did you see him?

A. In his office.

Q. What conversation did you have with Mr. Mayer? [582]

Mr. Mitchell: Object upon the ground no foundation has been laid as to who else was there.

(Testimony of John L. Selgrath.)

Q. (By Mr. Rissman): Was anyone else there?

A. There was Mr. Gabourie, superintendent of construction, Mr. William Walsh, and Mr. Hopper.

Q. Who is Mr. Hopper?

A. I believe he was Mr. Mannix' assistant.

Trial Examiner Riemer: Mr. whose assistant?

The Witness: Mr. Mannix.

Q. (By Mr. Rissman): And is Mr. Mannix with Loew's, Incorporated? A. Yes.

Q. What is his position?

A. General manager, I believe.

Q. And was anybody else there?

A. Mr. Scoggins.

Q. Who is he? A. He is a grip.

Q. Was there anybody else there that you can recall? A. No.

Q. Tell us what conversation took place in this meeting.

A. Well, he just tried to sell us the idea of going back to work.

Q. Who? A. Mr. Mayer. [583]

Q. What did he say?

A. Oh, he carried on the conversation that we should stay with the company and make pictures, and brought in the fact that the boys at war in the trenches, they needed entertainment, and we had been loyal to the company so many years that we should continue to be loyal.

Q. What did you say, if anything?

A. I told him that 1933, when I was working

(Testimony of John L. Selgrath.)

in the carpenter shop that this same thing had come up again, told him how that previous to that time how they came to the studio, if we didn't take a job as a grip or stand-by carpenter that we were fired, so I took that job, and told him about my daughter coming home one day from school and telling me that she couldn't play with the other kids because her dad was a scab. So that ended that.

Q. Before you told Mr. Mayer and the others present about this incident of 1933, did you say anything to him as to why you would not do carpentry work?

A. Well, I told him that I didn't believe that it should be settled with the men at the gates, it should be settled with the union's executives in the halls, and not out there fighting.

Q. Can you recall anything else that you told him?

A. Well, this man Scoggins, he got in an argument with Mr. Mayer, and he was ready to quit his job. I told Mr. Mayer [584] then what a good man he had been and how he had worked.

Q. What a good man Scoggins had been?

A. Yes. So he finally went over and sat down.

Q. Have you exhausted your recollection as to that conversation? [585]

A. Well, I don't remember any more about it.

Q. Did you say to Mr. Mayer and the others who were present at that time that you could not do

(Testimony of John L. Selgrath.)

carpentry work because it was against your principles as a union man to scab on any union?

Mr. Luddy: That is objected to as leading and suggestive.

Trial Examiner Riemer: Sustained.

Q. (By Mr. Rissman): Do you recall anything else that you said at that conversation?

A. No, I don't.

Q. Did Mr. Mayer or anyone else at that meeting direct you to anybody else's office after that?

A. Well, the meeting was over with and Mr. Scoggins and I started to leave and Mr. Hopper, I believe his name is Hopper now.

Q. Mannix' assistant?

A. That is right. He said Mr. Mannix wanted to see us.

Q. Did you see Mr. Mannix?

A. We waited for an hour and went over to his office.

Trial Examiner Riemer: Had Mannix been present at this meeting in Mr. Mayer's office?

The Witness: No, sir.

Trial Examiner Riemer: He was not?

The Witness: No. [586]

Q. (By Mr. Rissman): Did you see Mr. Mannix?

A. Mr. Hopper and Mr. Mannix, yes.

Q. The two of them, and you and Scoggins?

A. Yes.

Q. Where did you see them?

(Testimony of John L. Selgrath.)

A. In Mr. Mannix' office.

Q. What conversation took place at that time?

A. Well, they told us that we had been with the corporation so many years, that he didn't like to see us leave, and tried to sell us the idea, told us about a set that was down in the studio that they had had a lot of trouble over, and the carpenters were claiming the work and Local 44, they claimed the work, and how he had to go out and rent props in order to take the place of the part of the set in order to overcome the argument between the two locals, and so then he wanted us to say that we would go back to work, some part of the work, that we could go back on our regular jobs.

Q. What else was said at that time?

A. Well——

Q. By anybody, by any one of the four of you who were present?

A. They were just trying to tell us about how the carpenter was trying to get the work away from Local 44 of the I.A.T.S.E. and how they were going to try to keep the studios open, and that he thought we should stay with our [587] unions and do our work, whatever was asked us to do.

Q. What did you say? A. I said no.

Q. Did Mr. Scoggins say anything or ask any questions at that meeting?

A. He asked him if we did not do that work if we would lose our jobs, and he said he did not think so.

(Testimony of John L. Selgrath.)

Q. Who said he did not thing so?

A. Mr. Mannix.

Q. Was anything said about going back to your regular work?

A. Yes, we asked him if we could go back to our regular work and he said no, that we would have to do some of the work that was assigned to us, that was carpenter work.

Q. Was anything else said at that meeting?

A. No, sir, not that I can remember.

Q. Did you work in the studios at Loew's or M.G.M. at any time after March 24, 1945?

A. I went back on the 19th of December, 1945.

Q. Before we get to that, did you work at any time between March 24, 1945, and the end of the strike?

A. No, I did not.

Q. Were you asked to come back at Loew's at any time before the end of the strike?

A. Twice I was offered my job back providing I would work [588] from thirty minuts to two days in the mill as a carpenter.

Q. When were the offers made and by whom were they made?

A. On October 5th—the first offer was in July, by Mr. Lester White.

Q. Who is Lester White?

A. He is a cameraman that I had worked for in the studio. He came out to the house and told me he would like to have me go on a picture that was shooting on location, and he had talked to Mr.

(Testimony of John L. Selgrath.)

Gabourie and Mr. McDonald, and they had told him that if I would work probably thirty minutes or a day or so in the mill I could have my job back.

Q. What did you say to him?

A. I told him no.

Q. When was the second time?

A. I went before Mr. Fitzpatrick, the unemployment referee.

Q. That is an official of the State of California?

A. That is right.

Q. Where was this?

A. 1100 South Flower, I believe, the unemployment office there.

Q. Is that the office of the Unemployment Compensation Division?

A. That is right.

Q. Was there anyone from the company present at that time?

A. Yes, William Walsh. [589]

Q. What was the occasion of your being there at that time?

A. Well, I had applied for unemployment insurance, and it had went before the referee. I had the hearing on September 27, and it was held over on account of they wanted to contact the studio and so on October 5th when Mr. Walsh was there at that hearing, so the referee, Mr. Fitzpatrick, asked Mr. Walsh if I could go back to work at the studio and he said, "Oh, most certainly, you have been with us a good many years, we would like to have Mr. Selgrath with us."

(Testimony of John L. Selgrath.)

So Mr. Fitzpatrick asked him if I would have to do the work that I was not assigned as a grip.

He said, "Oh, yes." He said, "Sure, he would have to work a little while in the mill, then he would go back to his regular position."

Q. Did you accept that employment?

A. I did not, no, sir.

Q. After the strike was ended on October 31, 1945, did you go back to the studio?

A. I reported on October 31. I saw Mr. McDonald. He told me that—this was at the construction office—and I asked him if I was to come back, and he said, "Yes, but wait just a minute," that he would see Mr. Gabourie. He went into Mr. Gabourie's office and came out and told me that I was to come back to work the next morning, and I asked him, "Will I be back a key man?" [590] He said, "Yes, John."

Q. Did you come back to work the next morning?

A. I came back to work at 8:00 o'clock and my card was not in the rack, and I was told by a gang boss that was in the grip room to report to Mr. Gabourie.

Q. Did you report to Mr. Gabourie?

A. Yes, at 9:00 o'clock I reported to Mr. Gabourie.

Q. What conversation took place with Mr. Gabourie?

A. He just told me to report to Local 80.

Q. Did you report to Local 80?

(Testimony of John L. Selgrath.)

A. Yes, sir.

Q. Who did you see there?

A. Mr. Barrett.

Q. What conversation did you have with him?

Mr. Mitchell: Object upon the ground it is immaterial.

Trial Examiner Riemer: Overruled.

The Witness: I just went in the office and said, "Well, what about it?"

He said, "Well, John, I can't do anything for you. It is somebody higher than me."

So that is all.

Q. (By Mr. Rissman): Now, when you reported for work—

Trial Examiner Riemer: Gentlemen, the hearing will recess for five minutes.

(Short recess taken.) [591]

Trial Examiner Riemer: The hearing will be in order.

Q. (By Mr. Rissman): Mr. Selgrath, when you reported for work on October 31 and November 1st, 1945, were you told by anyone connected with Loew's, Incorporated, that there was no work for you because you didn't go to Bill?

A. When was this now?

Q. On October 31 and November 1st, 1945.

A. No.

Q. Are you a member of Local 80 at the present time?

A. Yes.

Q. Are you in good standing?

(Testimony of John L. Selgrath.)

A. Yes, sir.

Q. Have you always been in good standing in that local? A. Yes, sir.

Q. Were you ever advised by anyone connected with the local that you were not in good standing?

A. No.

Q. After October 31 or after November 1st, 1945, when was the next time that you saw anyone at the studio with respect to getting your job back?

A. I wrote Mr. Walsh, William Walsh, a letter and asked him if I could have my job back.

Q. Approximately when was that?

A. I would say that was around November 20th that I wrote the letter. [592]

Q. Did you get your job back after you wrote that letter?

A. I got an answer from him that he said that——

Mr. Mitchell: Well, now, wait a minute. I think these written documents are the best evidence, rather than repeating what is in them.

Mr. Rissman: Well, if you have them I would be glad to put them in evidence.

Mr. Mitchell: I don't know whether I do or not, but I will see. I have here a copy of a letter dated November 14, 1945, from Mr. Selgrath to Loew's, Incorporated, and a copy of a letter dated November 26, 1945, from Mr. Walsh to Mr. Selgrath, which I will be glad to furnish you if you want them.

Mr. Rissman: I have not seen them. I will use

(Testimony of John L. Selgrath.)

these, Mr. Mitchell, if you have no objection. [593]

Mr. Rissman: Will you mark this Exhibit 9?

(Thereupon the document above referred to was marked Board's Exhibit No. 9 for identification.)

Q. (By Mr. Rissman): Mr. Selgrath, I will hand you a document which has been marked Board's Exhibit No. 9 for identification, and ask you if that is a copy of the letter which you sent to Mr. Walsh, or which you sent to the Studios?

A. Yes.

Q. And did you send it on or about November 14?

A. Yes. I figured November 20. About November 14, yes.

Mr. Rissman: I will offer Board's Exhibit 9 in evidence.

Trial Examiner Riemer: Is there any objection? It may be admitted and marked in evidence as Board's Exhibit 9.

(The document heretofore marked Board's Exhibit No. 9 for identification was received in evidence.)

Mr. Rissman: I would like to have this marked Board's Exhibit 10.

(Thereupon the document above referred to was marked Board's Exhibit No. 10 for identification.)

(Testimony of John L. Selgrath.)

Q. (By Mr. Rissman): I show you copy of a letter dated November 26, 1945, which is Board's Exhibit 10 for identification. Do you recall if that is a copy of a letter you received from Mr. Walsh?

A. That is right.

Mr. Rissman: I will offer this as Board's Exhibit 10. [594]

Trial Examiner Riemer: Is there any objection, gentlemen? It may be admitted and marked in evidence as Board's Exhibit No. 10.

(The document heretofore marked Board's Exhibit No. 10 for identification was received in evidence.)

Q. (By Mr. Rissman): Directing your attention to the second paragraph in the letter from Mr. Walsh to you, Mr. Selgrath, which is Board's Exhibit No. 10, were you a member of Local 80 at that time?

A. Yes.

Q. Did you ever receive any notice from Local 80 that you were not in good standing?

A. I did not.

Q. Were you ever told by anyone connected with Local 80 that you were not in good standing?

A. No.

Q. Did you ever communicate with anyone from Local 80 after you received the letter from Mr. Walsh which is in evidence as Board's Exhibit 10?

A. I called Mr. Baird about the 18th of December, and he told me to go back to work at M.G.M.

Q. Did you go back to work at M.G.M.?

(Testimony of John L. Selgrath.)

A. I reported the next morning, yes, sir, December 19th.

Q. And who did you see at that time?

A. Mr. McDonald. [595]

Q. Did you have any conversation with him?

A. He told me Mr. Gabourie wanted to see me before I could go to work.

Q. Did you see Mr. Gabourie? A. Yes.

Q. Did you have any conversation with him?

A. He told me he would hire me as a new man, I would just be a grip, is all.

Q. What was your rate of pay as a grip, the rate at which you went back on December 19th?

A. \$1.63.

Q. What was your rate of pay when you were a key man? A. \$2.05.

Q. Did Mr. Gabourie give any reason as to why you would be hired as a new man?

A. Well, he said that I had left, and he didn't have any vacancies to put me back as a key man.

Q. What is your rate of pay now?

A. \$1.63.

Q. You are still a grip?

A. Still a grip; yes, sir.

Q. And what is the rate of the key men at the present time?

A. It is around \$139.50 a week. They are on a flat salary.

Q. That is for a 36-hour week?

A. No, that is about 60 hours. I won't say for sure. [596]

(Testimony of John L. Selgrath.)

Q. A 60-hour week?

A. A 60-hour week, and time and a half after 60.

Q. When you came back to work on December 19, 1945, did you have to fill out an employment application?

A. Yes, I believe I did. Now, I won't say for sure. Let me see. Yes, I think I did.

Q. Before the strike had you executed any authority to the company for deducting sums of money from your earnings for war bonds?

A. Yes.

Q. And for Motion Picture Relief?

A. Yes.

Q. Did you execute any such authority after you came back on December 19th? A. No.

Q. Have such deductions, and were such deductions made after December 19th? A. Yes.

Q. Were you given a new clock number when you came back on December 19th?

A. No. They work that very funny there. You always have the same clock number. When you come back you always have the same number.

Q. After March 24, 1945, were you willing to go back to work at Loew's, Incorporated, to your former position as a key man, [597] key grip man?

A. Yes.

Q. Are you now willing to go back to your former job as a key grip man? A. Yes.

Q. Did you tell us how long you had been a key grip? A. From July, 1933.

(Testimony of John L. Selgrath.)

Q. About 12 years? A. Yes.

Q. Have you spoken to Mr. Gabourie or anyone else in charge of the company since March 19 with respect to getting back on your own job as a key grip man, rather than just a grip man?

A. I don't believe I understood that.

Trial Examiner Riemer: Read the question.

(The question was read.)

Trial Examiner Riemer: Do you mean March 19?

Mr. Rissman: I mean December 19, 1945.

The Witness: Andy McDonald's assistant.

Q. (By Mr. Rissman): What is his name?

A. Don Duckfield.

Q. When did you talk to him?

A. He assigns men as the telephone calls come in, see; so I had been working in the shop, and so he come and asked me if I would go upon a property room, back of the property room there, and set up a wall, and stay there and see what was needed. [598] So I went up there and put the wall up, and went back and told him that it would be a first man's rate, and I didn't believe that he had authority to assign me to any such job as that.

So he said, "Well, Mr. McDonald will be in in a few minutes." So Mr. McDonald come in, and I told him what the job was, it was a first man's work, and he said, "Well, wait a minute," he said, "I would like to have you go up myself, I would love to have you go up and take the job, but wait, I will

(Testimony of John L. Selgrath.)

call Mr. Gabourie." And he called, and Mr. Gabourie said no, he couldn't do it.

Mr. Mitchell: When was this? I didn't object, but——

The Witness: It was in May, May of 1946. I can't give you the exact date.

Q. (By Mr. Rissman): Was that the only conversation you have ever had with any of them regarding your reinstatement to your former position as a key grip, rather than just grip man?

A. Yes.

Mr. Rissman: That is all.

Trial Examiner Riemer: May I interrupt to ask a few questions, Mr. Mitchell?

Mr. Mitchell: Yes.

Q. (By Trial Examiner Riemer): Mr. Selgrath, will you explain in a little more detail than you did before what your duties were prior to March 24, 1945, as a key grip? [599]

A. A key grip works for the company. He is directly under a cameraman. The cameraman and the director, they pick out various shots. Now, if there is any walls to move, the key grip supervises the moving of these walls, and he gets the plan of the set and so goes over the plan, and he finds out what walls can be moved or what beams can be taken out; and when the time arrives, he supervises all that. Then if there is any scaffold to be built, he is supposed to be capable of building any scaffold platforms, or outriggers. Lots of times on locations we

(Testimony of John L. Selgrath.)

would have outriggers to put on the side of ships, we will say. He has to do the supervising of that. And various times in buildings they want to put a platform out of the window, we will say, out four or five feet, maybe as high as—well, even the R.C.A. Building in New York, we have put a camera on top of the R.C.A. Building. And we have to use carpenter tools and rigging tools of all kinds. And on each of the sets we have reflectors that we use for lights, and we set them up and use our knowledge of lighting. And if it is approved by the cameraman, he goes ahead and shoots it, or else we change it. And camera cranes, what are known as the booms, we operate them. They have boom operators as of today, but any time they ask us to do it, why, we have to do it. There are so many things now, like we have to tell our foreman how much equipment we have to have on these different sets, you know, line up the sets, as they call [600] it, and usually talk it over with him on how many men we need.

Trial Examiner Riemer: Thank you. Mr. Mitchell, go ahead.

Cross-Examination

By Mr. Mitchell:

Q. When you say a key grip, is that sometimes known as a key company grip? A. Yes, sir.

Q. When you speak of a company, you are talking about a shooting company, isn't that right?

A. That is right, sir.

(Testimony of John L. Selgrath.)

Q. In the studios the units that engage in the production of an individual picture are called shooting companies, isn't that right?

A. That is right.

Q. So that if Clark Gable is playing in a certain picture, there are sets put up on stages, and then a group of people, including the actors, the cameraman, the director, and so on, go out to that set and constitute a shooting company, isn't that right?

A. That is right, yes.

Q. And in addition to the director and the artists, there is on a shooting company a script clerk, isn't that right?

A. That is right.

Q. And there is a chief electrician and his assistants?

A. Yes, sir. [601]

Q. And then sometimes they have crews of lamp operators?

A. Yes.

Q. On these so-called shooting companies?

A. That is right.

Q. And they have a—not a prop maker, but a property man who is a member of the shooting company?

A. That is right.

Q. And they also have a certain number of grips that are members of the shooting company, is that right?

A. And a unit manager.

Q. And a unit manager?

A. Yes.

Q. Now, with respect to these grips, they have a man called the first company grip?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

(Testimony of John L. Selgrath.)

Q. And he is, in a sense, isn't he, a straw boss?
Doesn't he work with his hands?

A. Yes, but he is not a straw boss.

Q. Well, he works with his hands?

A. That is right.

Q. And then there may be one or more assistant company grips, is that right?

A. That is right. [602]

Q. And then there may be some ordinary grips who are assigned to a company? A. Yes.

Q. The grips also do work away from the companies, don't they? A. That is right. [603]

Q. In the shops or somewhere?

A. All over the lot and in the shops, yes.

Q. Now, are you working now, Mr. Selgrath?

A. Yes, sir.

Q. Were you working yesterday, for instance?

A. No, sir.

Q. And you didn't go to work this morning?

A. No, sir.

Q. How many days have you been not working?

A. Oh, a couple of weeks, I don't know.

Q. A couple of weeks you have been off?

A. That is right.

Q. And you are not working now because there is now a strike in the motion picture industry, isn't that right?

Mr. Rissman: I object.

Trial Examiner Riemer: Overruled.

The Witness: I did not lay off because of the strike, sir.

(Testimony of John L. Selgrath.)

Q. (By Mr. Mitchell): Well, did anybody in the studio lay you off?

A. I am just off. I just took time off. I told Mr. McDonald I would see him later. I would work probably maybe, oh, work three or four weeks, and lay off a week.

Q. Well, you voluntarily stopped working?

A. That is right. [604]

Q. And when did you voluntarily stop work this last time?

A. I believe it was a week ago—let me see, two weeks ago Saturday, I believe it was. I wouldn't say for sure. Yes, it was two weeks ago Saturday I was off.

* * *

Q. Did you have any information during the period of the strike that the leaders of the I.A.T.S.E. were requesting the membership to perform such services as the studios might require in order to keep open?

Mr. Rissman: I object if the question refers to any time after March 24.

Trial Examiner Riemer: Read the question and the objection.

(The record was read.)

Trial Examiner Riemer: Overruled.

Q. (By Mr. Mitchell): Do you want to hear the question [605] again, Mr. Selgrath?

A. No, I understand it. The only conversation that I ever had with anybody in respects to that was

(Testimony of John L. Selgrath.)

with Mr. McDonald, and that was on March 24. That was on a Saturday, and he told me that that was the orders, the I.A.'s were going to try to keep the studios open.

Q. And did anybody connected with the I.A.T.S.E. ever tell you that?

A. Mr. Baird on that same morning, sir, he told us up there in the hall that the I.A.'s were trying to keep the studios open.

Q. And did he say what the members were to do in order to accomplish that result?

A. He told us we would have to do whatever work was assigned to us.

Cross-Examination

By Mr. Luddy:

Q. Mr. Selgrath, when did you first go to work; that is, what year, in the Hollywood studios?

A. About 1926, sir.

Q. And what classification of work?

A. I was a laborer. [606]

* * *

Q. Now, in 1933 or prior thereto, jurisdiction over the grips or the work that had been done by the grips, prior to that time was in the I.A.T.S.E., wasn't it? A. That is right; yes, sir.

Q. The I.A.T.S.E. went out on strike in July '33, didn't it? A. Yes, sir.

Q. And then you stepped in and took over the

(Testimony of John L. Selgrath.)

work that had been vacated by the I.A.T.S.E. groups, didn't you? A. Yes, sir. [609]

* * *

Q. (By Mr. Luddy): Now, when did you join the I.A.T.S.E. first? A. In 1936, I think.

Q. And is that when the I.A.T.S.E. came back into the studios and procured contracts for the first time since 1933? A. Yes.

Q. And the I.A.T.S.E. in 1936 reacquired jurisdiction over grips in the studio, didn't it?

A. Yes.

Q. And in order to work in the studios as a grip after 1936, you had to be a member of the I.A.T.S.E., is that right?

Mr. Rissman: I object, if the Examiner please.

Trial Examiner Riemer: Overruled.

The Witness: Yes. [613]

* * *

No. 12568

United States
Court of Appeals
for the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

WARNER BROS. PICTURES, INC., CO-
LUMBIA PICTURES CORPORATION and
LOEW'S INCORPORATED,
Respondent.

Transcript of Record
In Two Volumes
Volume II
(Pages 423 to 800)

Petition for Enforcement of Order of the
National Labor Relations Board

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Petition for Enforcement of Order of the
National Labor Relations Board

J. HAROLD ROGERS

a witness called by and on behalf of the National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. J. Harold Rogers.

Q. Where do you live, Mr. Rogers?

A. 2638 Bedford Street, Los Angeles.

Q. Were you employed by Warner Bros. Studio?

A. I was.

Q. When did you work there?

A. I worked there from November of 1921 until March of—when the strike was, when was that, March 12th?

Q. March 12, 1945? A. That is right.

Q. What kind of work were you doing at the time of the strike in 1945?

A. I was a prop maker.

Q. Under whom did you work? [617]

A. Under Gibbons who was the head of the department.

Q. How long had you been a prop maker at that studio? A. About three years.

Q. Prior to that, what kind of work were you doing there?

A. Well, I, for a good number of years I was assistant to Geib, who was head of the technical department, and I did carpenter work.

(Testimony of J. Harold Rogers.)

Q. What is Geib's position?

A. He was technical director, in other words, superintendent of all construction.

Q. Can you spell his name for the reporter?

A. Louis G-e-i-b.

Q. Were you a member of any labor organization at the time of the strike in 1945?

A. I was.

Q. Which one? A. I.A.T.S.E.

Q. Which local? A. Local 44.

Q. How long were you a member of Local 44?

A. Well, I believe from the time that Local 44 started, from the time it was made from 37 over to 44.

Q. And how long had you been a member of any local of the I.A.T.S.E.?

A. I was a member of the Local 33 back in 1919, from 1919 until 1921, when the jurisdiction was taken away from the I.A.T.S.E.

Q. After 1921 were you a member of any union?

A. From 1921 until about—until the time that I went into the I.A.T.S.E. I was not, no, sir.

Q. When did you go into the I.A.T.S.E.?

A. I believe it was in 1937. It was when the studios declared a closed shop.

Q. What kind of work were you doing at Warner Bros. immediately before the strike in March, 1945?

A. I believe that I was working on a piano. I won't say for sure whether it was that particular day of the strike, but I had been working on the same piano that Gus or Jesse——

(Testimony of J. Harold Rogers.)

Trial Examiner Riemer: Sapp?

The Witness: That Jesse Sapp was working on.

Q. (By Mr. Rissman): Did you work on the first two days of the strike, March 12th and 13th?

A. No, sir, I did not.

Q. Did you go to work on March 14, 1945?

A. That is right.

Q. How long did you continue working after that?

A. I think for about four or five days, if I remember right.

Q. Did you receive a blue slip at the time of your discharge? A. I did.

Q. Do you have it with you? [619]

A. Yes, I have.

Q. Will you please refer to it? What does the blue slip state opposite the printed word "Classification"? A. Prop maker.

Q. And what is stated as your rate of pay?

A. \$1.71.

Q. Is that blue slip dated? A. 3rd, 19-'45.

Q. What is typewritten after the printed word "Remarks"?

A. Refused to do carpenter work.

Q. Is that slip signed?

A. By F. L. Fuhrmann.

Q. F. L. or F. C.?

A. Well, it could be F. C. I believe that is right, F. C. [620]

* * *

(Testimony of J. Harold Rogers.)

Q. Were you asked to do carpenter work?

A. Personally, yes, sir, I was told I either had to do carpenter work or else.

Q. By whom were you told that and when?

A. I believe Brewer was out there the morning of—I don't just exactly remember the dates. Is that necessary? It happened I would say about four or five days after I went back to work after the strike, the strike was declared.

Q. Was it the day on which you received the blue slip?

A. I think it might have been that morning or the morning before. I believe it was early that morning, if I remember right.

Q. The calendar indicates that March 19, 1945 was on a Monday. Does that refresh your recollection as to when it was? [621]

A. I would say that it was Monday.

Q. You heard Mr. Brewer make a speech or talk to the employees?

A. That is right.

Q. Where was that?

A. That was in the carpenter shop.

Q. Did you hear Mr. Fuhrmann address the employees that day?

A. I did. That was later, I believe, later, early in the afternoon, and he came in and told us that we would have to do carpenter work, and right while he was there the boys talked it over and decided whether they would or whether they would not, and they refused to do so.

(Testimony of J. Harold Rogers.)

Q. Did you refuse with them?

A. I did. We were all in a body.

Q. Did you do carpenter work?

A. No, sir.

Q. Why didn't you?

Mr. Luddy: Now, to that I object upon the ground that it is immaterial to any issue in the case, for the reason that this man had a legal right to refuse to do carpenter work and by so refusing still preserved such legal right. His reason for refusing would be immaterial to any issue, and no matter what his reasons might be, they would neither add to nor detract from the legal right which he had.

Trial Examiner Riemer: What do you think of that position, Mr. Rissman?

Mr. Rissman: Well, I agree with Mr. Mitchell as to his legal right.

Trial Examiner Riemer: Mr. Luddy.

Mr. Rissman: As to his legal right to refuse to do carpentry, but I don't think that is any reason for or any basis for an objection to his stating what the reason was.

Mr. Luddy: My objection is that it is immaterial. If it is material, let's have the testimony and let us cross-examine on it.

Mr. Rissman: There has been no limitation on cross-examination on that subject.

Trial Examiner Riemer: There is a vital disagreement here, and I think there will be if I continue my rulings. The objection is overruled. Why

(Testimony of J. Harold Rogers.)

did you refuse to do carpentry work, is the question.

The Witness: Well, the carpenters were all out on strike. I was working in the prop shop, in a different department entirely, and I would have been, I considered that it would have been scabbing to go in the carpenter shop and do the work.

Mr. Luddy: I now move——

The Witness: In the first place, it was very much against my principles to even walk across the picket line, and at the time I did go back to work I went in and signed a protest before I crossed that picket line. [624]

* * *

Q. Did you ever work at Warner Bros. at any time after March 19, 1945? A. I did.

Q. When was that?

A. Early—the early part of this year; I would say it was early in March.

Q. 1946?

A. That is right. I was called, the I.A. called me on numerous occasions to report for work, but it was always at a different studio, except Warner Bros., and I didn't take the calls. Finally they called me up and asked me when I was going [627] to work.

I said, "When I get a call back to Warner Bros. Studio I will report for work."

They called me back within a half hour and told me to report immediately. I told them that was on too short notice, it would be impossible for me to get out there immediately. They called me back

(Testimony of J. Harold Rogers.)

in about a half hour and told me to report at 7:30 the next morning, or 7:00 o'clock the next morning, which I did. [628]

* * *

Q. (By Mr. Rissman): How long did you continue to work there? A. Three days.

Q. And what happened at the end of three days?

A. At the end of three days I went to Fuhrmann and asked him for a leave of absence, which he granted me. [629]

* * *

Q. Did you try to go back to work on October 31, 1945?

Mr. Mitchell: What is that question?

Trial Examiner Riemer: Read it.

(The question was read.)

The Witness: October 31?

Mr. Rissman: Yes.

The Witness: 1945?

Mr. Rissman: Yes, that is the date——

The Witness: That is the date the strike ended?

Mr. Rissman: Yes.

The Witness: I did; yes, sir.

Q. (By Mr. Rissman): What did you do?

A. We were out there, and the carpenters were all passed [632] through the line. In other words, they had to go by the window where Mr. Fuhrmann was, and he checked off the names as they went in. We waited until the carpenters had all gone through, and then we went up to the window, and

(Testimony of J. Harold Rogers.)

Fuhrmann told us that up to the present time our case was not settled, and we could not go to work.

Q. When you say "We waited," and "we went up to the window," to whom do you refer?

A. Well, there was about 15 of us prop makers.

Q. Do you want to go back to your former job at Warner Bros.?

A. Not any more, sir; no, sir.

Q. Up until what time were you able and willing to go back there?

A. I was willing to go back there up until the time after I went back early in March and saw the conditions that were existing out there.

Q. Are you still a member of Local 44?

A. I am, sir.

Q. And did you remain a member in good standing at all times from the time you first became a member?

A. I have, sir.

Mr. Rissman: That is all.

Trial Examiner Riemer: Mr. Mitchell?

Cross-Examination

By Mr. Mitchell: [633]

* * *

Q. Were you present in the mill on March 19th?

A. Yes, sir.

Q. When Mr. Brewer addressed a group of prop makers?

A. Yes, sir.

Q. What did Mr. Brewer say with respect to the desire of the I.A. to have men cross jurisdictional lines, or to do work required by the studios?

(Testimony of J. Harold Rogers.)

A. He told us it would absolutely be necessary for us to do the work in any line of work that we were called upon to do, in order to keep the studios open; if we did not do so, we would lose our cards.

Trial Examiner Riemer: What is the end of that answer?

(The answer was read.)

Q. (By Mr. Mitchell): You say lose your card, do you mean lose your membership card in the I.A.T.S.E.? A. Yes, sir; that is right.

Q. Were you present at a meeting on March 19th, 1945, addressed by Mr. Fuhrmann?

A. Give me that date again.

Q. The same date, March 19th.

A. I was, sir, twice, two different times. I talked to him, I was present at a meeting in the prop shop, and we were dismissed at 3:30 that afternoon and was called back again [634] at 5:00 o'clock to the carpenter shop, where there was another meeting held, and at the time—it was a long, drawn out affair now, if you want me to go into it.

Q. No, I haven't asked you that.

A. All right.

Q. I just asked you if you were at those meetings. A. Yes.

Q. You were at two meetings addressed by Mr. Fuhrmann? A. Yes, sir; I was.

Q. At the first meeting addressed by Mr. Fuhrmann did he tell you, or say that the prop makers

(Testimony of J. Harold Rogers.)

would have to go into the carpenter shop and do carpenter work?

A. He said it looked very much as though we would have to.

Q. And did you, among others, decline to do that work? A. I did, sir. [635]

* * *

Q. Now, you say on February 14th you asked Mr. Fuhrmann for a leave of absence?

A. That is right, sir.

Q. Did you ask him for any specific time?

A. No, sir.

Q. For a leave of absence?

A. No, I did not.

Q. You just said indefinitely?

A. I just asked him if I could take off on a leave of absence for a while.

Q. And you haven't been back since? [638]

A. That is right, sir. [639]

* * *

IRWIN P. HENTSCHEL

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. Irwin P. Hentschel.

(Testimony of Irwin P. Hentschel.)

Q. Mr. Hentschel, were you ever employed by Columbia? A. Yes.

Q. That is Columbia Pictures Corporation?

A. I believe that is the correct term.

Q. And when were you employed there?

A. To the best recollection that I have, I first went to [655] Columbia approximately sometime in 1937.

Q. How long did you continue to work there?

A. Well, there were times when there wasn't work, and during the years of 1937 and 1938, but that is where I made my most of my income, during 1937 and 1938, but since 1939 or thereabouts, in there, I would be continuously employed without any interruptions.

Q. From about 1939 until when were you continuously employed? When was the last time you worked there? A. March 19, 1945.

Q. What was your job at Columbia?

A. I was a prop maker.

Q. Were you a prop maker all the time that you worked there? A. Yes.

Q. Who was your boss?

A. My immediate superior at the time previous to my being terminated was Mr. Gasper.

Q. Was he the foreman?

A. He was the foreman.

Q. And did you have any other superiors at that time?

A. His superior was David Vail, who was in

(Testimony of Irwin P. Hentschel.)

essence the superintendent of the props and special effects department.

Q. Were Vail and Gasper your superiors all the time that you worked there? A. No. [656]

Q. For how long were they your superiors, how long before March 19, 1945?

A. Well, for the greater majority of the time Vail was my superintendent, but there were occasions when John Bendowski was my foreman, and as we work in the picture studios, we go from one shift to another in case of certian work that has to be performed required certain services, sometimes we go from one shift to another.

Q. Was your work in the prop shop or in the prop making department?

A. My work was in the prop shop.

Q. Will you describe in a little detail what your work consisted of in the prop shop?

A. I had sort of a peculiar job, inasmuch as it had to do with small work, as a usual rule. By small work I mean tedious work, had to do with jewelry, it had to do with miniature airplane motors, and various electrical devices I used in miniatures, it had to do with running a lathe and drill press, it had to do with rubber, and I would say that I had very little to do with wood.

Q. During the year preceding your discharge on March 19, 1945, did you work steadily?

Mr. Mitchell: I object upon the ground there is no evidence that Mr. Hentschel was ever discharged.

(Testimony of Irwin P. Hentschel.)

Mr. Rissman: I will change the question. [657]

Q. (By Mr. Rissman): Prior to March 19, 1945, did you work steadily in the year preceding that date?

A. The year preceding that date, according to a bulletin that was posted on the board, I worked more days per man than any man in the shop. To be correct, I worked 297 days out of a possible 360 or whatever the figure is.

Q. Did you go to work on March 12, 1945, that is, the first day of the strike?

A. The first day of the strike, yes, I did.

Q. How long did you continue to work after March 12, 1945?

A. I worked on March 12, until somewhere around 6:30 in the evening.

Q. Did you work on March 13 and the following days?

A. No, I didn't work on March 13.

Q. When was the first time you worked after March 12, 1945?

A. On March 14.

Q. And how long did you continue working after that?

A. Until March 19th.

Q. What kind of work were you doing during the day of March 19?

A. I was working at a drill press, drilling rubber arrowheads.

Q. How much of that work did you have to do?

A. I had a minimum of a half day's work, probably would have run to a day's work. There was a numerous amount of arrows, arrowheads.

(Testimony of Irwin P. Hentschel.)

Q. Did you attend any meeting in your studio on that day which was addressed by any officer of the I.A.T.S.E.? A. I did.

Q. Where was the meeting held?

A. The meeting was held in the mill.

Q. Is that the carpenter shop?

A. That is considered the carpenter shop, yes.

Q. What time of the day was it?

A. As close as I remember, it was after lunch, somewhere around 1:00 o'clock.

Q. Who advised you of the meeting?

A. My foreman, Mr. Gasper.

Q. And what did he say to you?

A. He says that there would be a meeting of all the I.A.T.S.E. men in the mill, and I should attend.

Q. That is, would be a meeting in the mill of all the I.A.T.S.E. men? A. Yes.

Q. Where was the mill with respect to where you were working at that time?

A. The mill was directly in front of the prop shop. As far as that is concerned, the prop shop was an addition, or that was directly—there was no partition between the prop shop and the mill.

Q. Did you go to the meeting? [659]

A. I did.

Q. Were there other employees present?

A. There were.

Q. Were any supervisory persons present?

A. There were.

(Testimony of Irwin P. Hentschel.)

Q. Who was there who was a supervisor?

A. Well, there was the studio manager.

Q. What is his name?

A. I can say that he is the nominal head of the electric department. I don't recall his name.

Q. Does he have any nickname by which he is known? Perhaps it will come to you later. Was any other supervisory person present?

A. Mr. Vail.

Q. Who is Mr. Vail?

A. He is the superintendent.

Q. Is that David Vail?

A. Yes, David Vail.

Q. You have already told us who he is. Who else was present who was a supervisor or boss or executive?

A. Mr. Bendowski and Mr. Gasper.

Q. Who was present from the I.A.T.S.E. other than the members who were employees of the Columbia?

A. Mr. Brewer, Mr. DuVal, Mr. Stickling. That is all.

Q. Who is Mr. Stickling? [660]

A. I believe him to be one of the vice presidents of, or some representative of the International. I don't know his exact capacity.

Mr. Luddy: I do not want to confuse you, but Mr. Stickling was not here at any time. Perhaps he means Mr. Billingsley, one of the vice presidents.

The Witness: I think that would be correct. I know that he was one of the I.A.T.S.E. officials.

(Testimony of Irwin P. Hentschel.)

Q. (By Mr. Rissman): You knew him as one of the vice presidents of the I.A.T.S.E.?

A. Yes.

Q. You had never met this vice president before who was probably Mr. Billingsley, had you? Did you know him?

A. No, I know very few of the International officials, just that I was either told, or some way or another—anyhow, he came in with Mr. Brewer, and it was common knowledge that he was an official of the I.A.T.S.E.

Q. You were a member of Local 44 at that time, is that correct? A. I was.

Q. What did Mr. Brewer say, or anyone else say, at that meeting in the mill on March 19, 1945?

A. That we were to do any and all work that was assigned to us by the studio heads.

Q. Who said that? [661] A. Mr. Brewer.

Q. Was anything else said by anybody at that meeting?

A. As far as I can recollect, that was the only speech made. It was a very short speech. There was no comment.

Q. Were any questions asked by any of the persons present? A. No.

Q. Did any of the studio officials, such as Mr. Vail, or any of the others, say anything?

A. They did not.

Q. After this meeting did you return to your work? A. I did.

(Testimony of Irwin P. Hentschel.)

Q. Did you have any conversation with any of your superiors at that time, that is, after returning to work on that day?

A. Approximately five minutes after I returned to work.

Q. With whom did you have a conversation, and where did it take place?

A. With Mr. Gasper, took place in the prop shop.

Q. Who was present besides you and Mr. Gasper?

A. Mr. Gasper whispered in my ear. [662]

Q. (By Mr. Rissman): What did he say to you?

A. He says, "You will have to drop that work, dump that work now and go over and paint those arrows, or else you will have to see Mr. Vail." He said, "I am sorry, but I can't do anything about it, and you will have to see Mr. Vail if you refuse to do it."

Q. What did you say?

A. I said, "I will see Mr. Vail."

Q. Did you say anything else to Gasper at that time?

A. At that time, no.

Q. Did you see Mr. Vail?

A. I did.

Q. How soon after this conversation with Gasper?

A. Immediately.

Q. Where did you see Mr. Vail?

A. In his office.

Q. Who was present?

A. Mr. Vail and myself.

(Testimony of Irwin P. Hentschel.)

Q. What did you say and what did he say?

A. Well, I was in there for approximately 10 minutes. The greater portion of that time we discussed union affairs, and the sum and substance of it was that Mr. Vail asked me what the trouble was, and I told him that he knew perfectly well what the trouble was. And I says, "I have been asked to paint." [663]

And he says, "Well, why don't you?"

And I told him that he knew perfectly well why I couldn't paint, because on numerous occasions previously we had had talks about the union situation, and he knew my position as to what my feelings in the matter were, and I told him that I couldn't paint for the simple reason that it was against my principles.

Trial Examiner Riemer: We will suspend for a few minutes.

(A short recess was taken.)

Trial Examiner Riemer: Will you pick up the last remarks of the witness?

(The answer was read.)

Trial Examiner Riemer: Does that finish your answer, Mr. Hentschel?

The Witness: No. It was against my principles to take any man's job during a labor dispute, that I was under the impression that I was hired as a prop maker, and that under no circumstances did prop making come under the classification of paint-

(Testimony of Irwin P. Hentschel.)

ing. And the conversation continued along those lines, and Mr. Vail was red in the face, and he just shrugged his shoulders. And I asked him if I understood that my services were no longer required by Columbia Pictures if I refused to paint, and he said, "Yes."

I reiterated that question, and again he said, "Yes." [664]

I then asked him for my availability slip, and after some length of time, groping in his desk he says that he didn't have an availability slip for me, that I would have to get it down at the time office.

Q. (By Mr. Rissman): Did you go down to the time office? A. I did.

Q. And what did you do there, and with whom did you talk?

A. I talked with a person who I believed to be the head of the time office, a person by the name of Al. And he claimed that he had no availability slip for me, that it should be in the possession of Mr. Vail.

Q. Did you see anybody else with respect to an availability slip?

A. I then went to see the personnel manager.

Q. What is his name? A. Mr. Lacy.

Q. Was all this on the same day?

A. It was.

Q. What conversation did you have with Mr. Lacy?

A. Well, it was very short. He was noncommittal.

(Testimony of Irwin P. Hentschel.)

Q. Well, tell us what he said and what you said.

A. I asked him if he could give me the specific reason why, after years of employment with the studios, with the Columbia Pictures, why he should see fit at this time to fire me; and he says that his hands were tied, he couldn't do anything [665] about it. And I then asked him for an availability slip, and he says that the only thing he could give me was an extended availability slip. And I says that I would like to have one that would let me get a job somewheres on the outside, because under the circumstances that I wouldn't be able to work in the picture business at the present time. He says that he was unable to give me that sort of an availability slip, that I would have to go down to the U.S.E.S. offices.

Q. Did you ever have any further conversation with Mr. Vail or any other studio official after March 19, 1945?

A. Yes.

Q. With whom, when and where?

A. On the morning of the termination of the strike.

Q. October 31, 1945?

A. If that is the day on which the men were to go back to work, that is the day.

Q. And with whom did you have the conversation?

A. The first conversation I had was over the telephone with Mr. Gasper.

Q. When was that, that same day?

(Testimony of Irwin P. Hentschel.)

A. That morning.

Q. What conversation did you have with him?

A. He asked me to come to work at 2:00 o'clock the next day, and I told him that wasn't my regular shift, that I [666] had worked a number of years on the night shift and I thought that I was entitled to my old job on the morning shift. And he says that I would have to talk to Mr. Vail about that.

Q. Did you talk to Mr. Vail? A. I did.

Q. That same day? A. That same day.

Q. Was it a telephone conversation, or did you see him?

A. It was a telephone conversation.

Q. What time of the day was it, approximately, how long after the first conversation with Gasper?

A. I would say within an hour.

Q. What did you say and what did Mr. Vail say?

A. Mr. Vail asked me what I intended to do. Oh, excuse me. He asked me if I was coming in to work, and I told him that I had intended coming in at 1:00 o'clock, when the rest of the men went in and have a talk with him, and he says, "Were you coming in to work?"

And I says, "No." I says, "I thought it best I come down and talk to you, so that we have an understanding as to my hours of work and the feeling of the company towards me as an employee."

He says, "Oh, so now you refuse to work?"

(Testimony of Irwin P. Hentschel.)

I says, "No." I says, "My intention was not to refuse [667] to work." I says, "In fact, if you want me to work," I says, "I would only be too glad to bring my tools in and go to work today at 1:00 o'clock with the rest of the men."

And he says, "Well, you do that."

Q. Did you go in? A. I did.

Q. Did you go to work?

A. I went in. I stood in line with the rest of the employees, and as we approached the time office to receive our time cards every one who I was able to see received a regular time card that was printed by the addressograph machine which they employed. However, when it came to my turn of receiving my card, they had no record of my name on a time card, and the time clerk then proceeded to make one out in writing.

Q. Did you go in then?

A. Then I went in and reported to the prop shop.

Q. To whom did you report?

A. I reported to Mr. Gasper.

Q. What happened then?

A. Well, I set my tools down in the immediate entrance of the prop shop, and Mr. Gasper said that I should go right—go immediately to a stage. I don't recall the number, but I think it was stage 3.

Q. Did you go to stage 3? [668] A. I did.

Q. What happened when you got there?

A. I reported to a gang boss by the name of Mr. Hernandez.

(Testimony of Irwin P. Hentschel.)

Q. Did you go to work? A. I did.

Q. How long did you continue working there?

A. Until the end of that shift on that particular day.

Q. Did you work for Columbia after that?

A. I did not.

Q. What happened at the end of that shift that day?

A. I was told that there was no more work, and that I was on call, as told by Mr. Bendowski.

Q. Did you ever receive any call from Columbia after that? A. I did not.

Q. In the past in your experience as an employee of Columbia, you testified you had been laid off because of lack of work, have you not?

A. Yes, that was the excuse that was given to me by Mr. Bendowski.

Q. I mean prior to the time, prior to that time, back before 1939, you were laid off for lack of work at various times, were you not? A. Yes.

Q. Were you always called back? A. Yes.

Q. How did you get your job back in those instances after you had been laid off because of lack of work? A. I was called by the studio.

Q. Were you ever called back by Columbia after October 31, 1945? A. No. [670]

* * *

Q. What did he say about your leaving the studio, if anything, when you finished this conversa-

(Testimony of Irwin P. Hentschel.)

tion about your role and about your not wanting to do what you called painters' work?

A. Well, I asked him, the last words that I remember is that I asked him specifically whether in refusing to do work that I considered to be painters', whether Columbia Pictures no longer considered me an employee, and he said yes. [691]

* * *

Q. Did you ask him why you were discharged? You claim that he said you were discharged?

A. I asked him in the way that I already have told, that I [693] asked him, "Do I understand that if I refuse to do this particular work that I am fired?"

Q. And what did he say to that?

A. He says, "Yes." [694]

* * *

Q. You knew, did you not, that the International officers of the I.A.T.S.E. had ordered you and all members of the I.A.T.S.E. first to go through the picket line and, secondly, to do any work which they were asked to do by the employers in order to keep the studios open? A. I did. [706]

* * *

WILLIS F. HOWE

a witness called by and on behalf of the National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. Willis F. Howe.

Q. Mr. Howe, prior to the strike of 1945, were you employed at Warner Bros.?

A. Yes, sir.

Q. How long did you work there?

A. From 1938.

Q. Until when?

A. Until the morning of the strike.

Q. What kind of work did you do?

A. Electrical; that is, on the companies.

Q. In what department?

A. On the company.

Q. Under whose supervision did you work?

A. Well, my boss was Slat's Comes.

Q. Can you spell his last name?

A. C-o-m-e-s, I believe.

And Jack Ohl, was the assistant chief.

Q. Will you describe your work for us? What did you actually do?

A. Well, at that time I just quit my job on the best boy's job, and I worked on the floor, lighting up the edges, or backing, or whatever it happened to be had to be done, operating the lights and handling men.

(Testimony of Willis F. Howe.)

Q. Were you a member of any labor organization during the time that you worked at Warner Bros.?

A. Just 728.

Q. That is Local 728 of the I.A.T.S.E.?

A. That is right.

Q. When did you first become a member of that union?

A. 1938.

Q. You say you worked with the companies. Do you mean the shooting companies that are shooting the picture?

A. That is right.

Q. And you worked on the stage or set?

A. That is right.

Q. Did you also perform your work outside of the studios whenever the companies were on location?

A. Yes. [723]

Q. When you were working either in the studio on the set or out on location on the set, from whom did you take your orders, your directions?

A. Well, you have a gaffer on the set.

Q. What is a gaffer?

A. Well, a gaffer—he works with the cameramen. He lights it up, just as the cameraman wants to have it. He is the head man of the set. He roughs everything, he lights everything up, and if the cameraman wants to change something, he will call on the gaffer, and the gaffer tells me to heat the light up, or heat it down, or trim it up, or whatever the case might be.

Q. Did you go to work on March 12, 1945?

A. No, sir.

(Testimony of Willis F. Howe.)

Q. Did you go to work at any time after March 12, 1945?

A. Yes, I went to work for Monogram.

Q. I mean at Warner Bros., for instance.

A. No, no.

Q. When was the last time you worked with Warner Bros.?

A. It was on Saturday.

Q. March 10, 1945?

A. That is right.

Q. On March 12, 1945, did you appear at the studio?

A. Yes.

Q. Did you go in? [724]

A. No.

Q. Did you hear any discussion among the employees, and did you participate in any discussion among the employees of your department?

A. I did.

Q. Yes.

A. Not that I—there was a lot of fellows around. Not that I remember, that amounted to anything.

Q. Did any other men doing your work stay out on March 12, 1945, to your knowledge?

Mr. Mitchell: Object as being immaterial.

Trial Examiner Riemer: Sustained.

Mr. Mitchell: We are only charging one man here.

Q. (By Mr. Rissman): Were you with anyone else on March 12, 1945, when you came down to the studio?

Mr. Mitchell: Object as being immaterial.

Trial Examiner Riemer: Overruled.

The Witness: I was with Kenny Coffey, taking him to work.

(Testimony of Willis F. Howe.)

Q. (By Mr. Rissman): Did you hear any statement or speech by Mr. Roy Brewer of the I.A.T.S.E. on March 12, 1945?

A. Not much of it. I just walked up, heard a little conversation, and I asked him, "Who is that?" And he said, "That is Roy Brewer."

Q. Where was that? [725]

A. In front of the studio.

Q. Who was with Mr. Brewer?

A. Well, I don't know. There was several people walking back across the street with him.

Q. Did you hear Mr. Brewer say anything?

A. No, not that I could answer that. I was too far away from him.

Q. Why didn't you go to work on March 12th?

Mr. Mitchell: Wait a minute. Object to that as being immaterial. This man may have secret reasons why he does not want to go to work, and they are of no materiality. I think they are of no materiality in any event, but they are certainly of no materiality unless communicated to respondents.

Mr. Luddy: We object upon the grounds it is immaterial.

Trial Examiner Riemer: It is the same question that has come up with every one, is it not?

Mr. Mitchell: Not quite. Here is a man who does not even come to work. He is not asked to do anything outside of jurisdiction. He just fails to show up. He may have some secret reason. Maybe his wife is sick, or he may have some reason he does

(Testimony of Willis F. Howe.)

not want to go to work, but that is of no materiality, what is in his heart when he comes to work or does not show up.

Trial Examiner Riemer: Objection overruled.

Repeat the question to the witness. [726]

(The question was read.)

Q. (By Mr. Rissman): You may answer.

A. Oh, quite a picket line there. I figured that I had no business going through that picket line.

Q. You did not go through the picket line at any time during the strike, did you?

A. No, sir.

Mr. Mitchell: I move that the previous answer to which I made objection—that is, where I objected to the question—be stricken.

Mr. Luddy: We make the same motion.

Trial Examiner Riemer: Motion to strike denied.

Q. (By Mr. Rissman): Did you try to go into the studio at any time after March 10, 1945?

A. After March 10th, after the strike was over?

Q. After the strike was over. A. Yes.

Q. Do you recall when?

A. The day it was over.

Q. That was on October 1, 1945?

A. That is right.

Q. Did you go into the studio?

A. Oh, I got into the gate, is all.

Q. Tell us what happened.

A. Well, about five or six of us walked over.

(Testimony of Willis F. Howe.)

Q. Who were the others, if you recall?

A. Paul Stanley was one of them, and Kenny Coffey was another, and—I can't place—I mean, I can't remember the other names, the other men who were there.

Q. All right. Tell us what happened.

A. Well, they was in line, and pretty soon Blaney Matthews walked up with a girl, and he had a camera in his hand.

Q. Who? A. Blaney Matthews.

Q. Who is he?

A. Chief of Police of Warner Bros.

Q. You said you were in line. In what kind of a line were you?

A. Well, they ordered everybody to go back to work, and they said, "Come on, you are going to work, too," and I said, "I am going to be right with you." So I walked across the street, and there was a line of people—oh, hundreds of feet long, you know, four abreast, and three abreast, in big lines.

Q. Were these lines of people waiting to enter the studios? A. Yes, waiting to clear in.

Q. You say you were standing in line when Mr. Matthews came along? A. Yes.

Q. Tell us what happened. [728]

A. He walked up and said, "You fellows get out of that line and you get in this line over here." So, there was nobody in the other line. So, we asked why he had this girl—this girl kept photographing us from different angles. So somebody said, "That

(Testimony of Willis F. Howe.)

don't look good to me," and remarks were made in the line, and we moved up then. We wanted to clear. And they said, "No call for you fellows at all."

So, Paul Stanley says, "I will go call and find out what it is all about."

So, we called and they told him, "No."

Mr. Mitchell: Wait now. I object to the "we called," unless we have some foundation laid as to who "we" is, and who talked.

Trial Examiner Riemer: Sustained. Establish that.

Q. (By Mr. Rissman): Now you say Paul Stanley made a telephone call? A. He called, yes.

Q. Where was he when he made the call?

A. In the office in the big room, as you go through to clear through, where the time clocks are.

Q. It is in the Warner Bros.' office there?

A. That is right.

Q. Were you there when Stanley made the call?

A. Yes.

Q. Could you hear what he said? [729]

A. Just what he—I remember what he come and told us, that——

Mr. Mitchell: Just a minute.

Q. (By Mr. Rissman): Could you hear what he was saying into the telephone? A. Yes.

Q. What did you hear him say?

A. He asked if——

Q. Do you know, first, who did he call?

(Testimony of Willis F. Howe.)

A. Well, he called either——

Mr. Mitchell: Wait. Object to that on the ground it calls for a conclusion unless he heard him.

Trial Examiner Riemer: Do you know who he called? Was that the question?

Objection overruled.

Q. (By Mr. Rissman): Do you know who he called? A. He said he talked to Jack Ohl.

Mr. Mitchell: I move that the statement be stricken upon the ground that it is hearsay.

Trial Examiner Riemer: Motion to strike denied.

Q. (By Mr. Rissman): Did you hear what he said on the telephone to Jack Ohl?

Mr. Mitchell: Wait a minute. Object to the form of the question upon the ground that no foundation has been laid to show he even talked to Jack Ohl. It is just this [730] witness' repetition of somebody else's statement. When he asks the question in that form, it affirms something this man does not know.

Trial Examiner Riemer: Sustained.

Q. (By Mr. Rissman): What did you hear him say?

A. He asked him why he could not go back to work.

Q. What else did you hear him say?

A. Well, that was about all I heard him say to him.

Q. Did Mr. Stanley tell you what was said to him over the 'phone?

Mr. Mitchell: Object as being immaterial, whether he did or not.

(Testimony of Willis F. Howe.)

Mr. Luddy: Object to it upon the grounds that it is hearsay as far as we are concerned.

Trial Examiner Riemer: Overruled.

Mr. Mitchell: That can be answered yes or no, I think.

Trial Examiner Riemer: Yes, it can be.

Answer it yes or no.

Mr. Rissman: Do you remember the question?

The Witness: Yes.

Q. (By Mr. Rissman): What is your answer?

A. He said they had no thought—

Mr. Mitchell: Wait a minute. You are asked to answer that yes or no.

Q. (By Mr. Rissman): Did Mr. Stanley tell you what was [731] said to him over the telephone?

A. Yes.

Q. What did he say was said?

Mr. Mitchell: Object to that as being immaterial, also on the ground it is hearsay. It seems to me where you are trying to prove an application for employment, that ought not to be done by hearsay if Stanley is available.

Mr. Luddy: Object to it upon the grounds it is immaterial and hearsay.

Trial Examiner Riemer: Overruled.

The Witness: He said that they had no call for us.

Q. (By Mr. Rissman): What happened after that? A. The same day?

Q. On that day.

(Testimony of Willis F. Howe.)

A. About going back to work?

Q. Did you leave the studio?

A. Yes, I did.

Q. Did you try at any other time on that day to go back to work in the studio?

A. Just the next morning.

Q. That would be on November 1st?

A. That is right.

Q. Did you talk with anyone there?

A. Yes.

Q. With whom? [732] A. Mr. Jack Ohl.

Q. You talked to him yourself? A. Yes.

Q. In person, or on the telephone?

A. On the telephone.

Q. Where were you when you called him?

A. My home.

Q. What conversation did you have with Jack Ohl? A. I called and——

Q. You called him at the studio? A. Yes.

Q. All right. Tell us the conversation.

A. I asked him how about our going back to work, and he said, "Well, Willis, it is awfully slow now."

So I said, "Slow?"

He said, "Yes."

I said, "You have got 48 permit men working over there."

And he says, "Yes, I know it," he said, "I am sorry, but" he says, "it is above me." No. He says, "I am sorry. It is higher up than I am."

(Testimony of Willis F. Howe.)

Trial Examiner Riemer: Will you read that, please?

(The record was read.) [733]

Q. (By Mr. Rissman): What kind of membership did you have in Local 728 of the I.A.T.S.E.?

A. What kind of membership?

Q. Yes.

A. Well, all the electricians belonged to 728, which is lamp operators.

Q. Were you a permit man or did you have a class A membership or what kind of membership did you have? A. Class A.

Q. Were you always in good standing in Local 728? A. Yes, sir.

Q. At all times since you first became a member?

A. Yes, sir.

Q. After November 1st, 1945, did you ever again call Warner Bros. and try to get your job back?

A. Yes, two or three times.

Q. With whom did you talk on those various occasions?

A. Different people in the office, some of them voices I had never heard in the studio before. I talked to them over the phone.

Q. What were you told about getting back to work?

Mr. Mitchell: Object to that upon the ground no proper foundation has been laid as to time.

Trial Examiner Riemer: Sustained.

Q. (By Mr. Rissman): Do you recall approxi-

(Testimony of Willis F. Howe.)

mately when you [734] called after November 1st, 1945?

A. During that week again, I don't know exactly, I don't remember the date.

Q. Some time during the week of November 1st?

A. During the same week.

Q. Do you know with whom you spoke?

A. No, just somebody in the office answered the phone.

Q. What office did you call?

A. Our electrical office where we always get our calls and our orders.

Q. During the time that you were working at Warner Bros., from 1938 to 1945, had you ever had occasion before to call the office for any reason?

A. Oh, yes, every day four or five times a day or more.

Q. Did you ever have occasion to call the office when you were at home or on the outside?

A. Oh, yes.

Q. When you called the office, for whatever purpose you called, during the time you worked there, did you always know the name of the person with whom you spoke at the other end?

A. Most of the time, yes.

Q. Were there times that you did not?

A. Yes, there were times, when two or three times I would say or more there would be some new man put in there. [735]

Q. How many people were there in this office who would be around the phone there?

(Testimony of Willis F. Howe.)

A. Oh, as a rule there was about two to three in that office there.

Q. When you called after November 1st and during that week, what conversation did you have with whoever answered the phone?

Mr. Mitchell: I object to that upon the ground no foundation has been laid, particularly if it is intended to show that this man made application for employment, that is of no materiality, if he simply talks to some clerk. If he wants employment he should go to his boss, and the way the question is framed, it makes it utterly impossible to refute the testimony.

Trial Examiner Riemer: Sustained.

Mr. Rissman: If the Examiner please, I think we have a right to show that in attempting to get to the boss, it is like trying to get through a brick wall.

Trial Examiner Riemer: I am not sustaining the objection because I agree with everything that Mr. Mitchell said in the objection, but it is vague and indefinite and I feel that I can't put any value on it.

Q. (By Mr. Rissman): Did you make attempts to get your job back?

Mr. Mitchell: That is the same question. [736]

Trial Examiner Riemer: Sustained.

Q. (By Mr. Rissman): Did you make any other calls after this one you told us about?

A. Yes, two of them, two more is all.

(Testimony of Willis F. Howe.)

Q. With whom did you talk?

A. Bob Amie.

Q. Who is he?

A. He is the fellow that puts out the calls, that is calls you on the phone, when a man has got to be called, in other words.

Q. When did you talk with him?

A. I don't know the date on that.

Q. Approximately?

A. Oh, it all happened within about two or three weeks after the strike was over.

Q. That would be some time in November of 1945?

A. Yes.

Q. What conversation did you have with Amie?

A. Well, I asked him what was wrong, if he could find out why I couldn't come back to work, and he told me that there was a lot of people trying to find out themselves why I was not back to work, and he thought it would be taken care of in time.

Q. Now, when you were working for Warner Bros., from 1938 to 1945, were there occasions when you were off of work [737] because there was no picture being made or because there was lack of work?

A. No, not in the last five or six years.

Q. Well, go back before 1939 or 1940; were there other occasions when you were off because of lack of work?

A. Yes, I would say in 1937—I mean in 1938 and in 1939 there were times we were off a couple of days at a time.

(Testimony of Willis F. Howe.)

Q. When you were off because of lack of work, were you always called back?

A. Well, I was either called back or I called them and they said to come on in.

Q. During the time that you were working for Warner Bros., from 1938 until the strike of 1945, were there ever any complaints about your work or criticism about the way you performed your job?

A. Not that I know anything about. [738]

* * *

Cross-Examination

By Mr. Mitchell:

Q. During the period between 1938 and March 12, 1945, were you employed at Warner Bros. every day?

A. Every day for the last seven years.

Q. You are sure of that? A. Yes.

Q. No layoffs at all?

A. Not in the last—well, I might be wrong for a half a year, but not in the last, I would say, easy five years.

Q. Just prior to March 12, 1945, you were doing work as a lamp operator, weren't you?

A. Lamp operator.

Q. Isn't that what you call it? [740]

A. Best boy on the set there. I was best boy for a year or so.

Q. That was prior to March 12, 1945, how long prior to that? A. Oh, just a week.

Q. During the week which commenced—that

(Testimony of Willis F. Howe.)

would be March 5th, you were working as a lamp operator? A. Yes.

Q. Not as a best boy? A. No.

Q. And not as a gaffer?

A. No, I quit my job.

Trial Examiner Riemer: I am a little bit confused, Mr. Mitchell. Could you inquire so that I can be clear, the difference between a gaffer and a best boy and a lamp operator?

Q. (By Mr. Mitchell): Well, a gaffer is the head lamp man on a shooting company, isn't he?

A. That is right.

Q. As you testified on direct examination, under the direction of the cameraman he sees to the placing and focusing of lamps? A. That is right.

Q. And he may do it himself or he may have others to help him? [741]

A. That is right.

Q. Then he has an assistant, doesn't he?

A. Yes, the best boy.

Q. As a rule, on the shooting company?

A. That is right.

Q. That man is called the best boy?

A. That is right.

Q. Then, on a shooting company, depending on the size of the set, there are lamp operators who actually attend to placing and focusing and doing the other things that you have to do to a lamp to have it give you the correct light?

A. That is correct.

Q. On large sets there may be how many, 50

(Testimony of Willis F. Howe.)

lamp operators or more?

A. As high as two or three hundred maybe.

Q. And on small sets there may be as few as how many?

A. Oh, ten or fifteen, as a rule, on a small set.

Q. There is a considerable fluctuation in the number of lamp operators needed?

A. That is right.

Q. And in the industry generally, the studio one day may need several hundred lamp operators and the next day need only a few lamp operators, is that right?

A. That is right.

Q. That is, the lamp operator's job is one that in the [742] industry fluctuates, is that right?

A. That is right.

Q. And when the lamp operator is not needed in the studio, he is laid off, isn't he?

A. That is right.

Q. And then he customarily goes to his union and puts his name on the call book, doesn't he?

A. Unless he has been working at one studio a long time, he might take a day off.

Q. Might lay off for a few days?

A. That is right.

Q. Or the studio might call him back individually sometimes?

A. Or he would call. They would tell him either call in or come in maybe on a certain date, or you can call in.

Mr. Mitchell: May I have just a moment?

Trial Examiner Riemer: Yes, sir. We will re-

(Testimony of Willis F. Howe.)

cess for five minutes.

(Short recess taken.)

Trial Examiner Riemer: The hearing will be in order.

Q. (By Mr. Mitchell): On the day that the strike ended, October 31, 1945, you said you were out in front of Warner Bros. with a lot of men?

A. Yes.

Q. And you used the words "They said everybody was going [743] back to work"?

A. That is right.

Q. Who said it?

A. Well, all the men in the line, lots of them in the line said everybody goes back to work. Maybe a hundred of them said it and maybe it was two hundred.

Q. The men in the line?

A. No, outside. The line had not been formed yet to go in.

Q. Who were these, Conference of Studio Unions men?

A. Different men, painters and everybody else and carpenters.

Q. Conference of Studio Unions men?

A. That is right.

Q. Those were the men who said everybody is going back to work? [744]

* * *

Q. Did you receive information from any source to the [745] effect that the I.A.T.S.E. officers had

(Testimony of Willis F. Howe.)

ordered all members of the I.A.T.S.E. not to respect the picket line?

A. Just by conversation was all.

Q. Conversation with whom?

A. With different people.

Q. With members of the I.A.T.S.E. that you knew?

A. Said that they had ordered them in, ordered the men back to work. [746]

* * *

KENNETH B. COFFEY

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. Kenneth B. Coffey.

Q. Were you ever employed at Warner Bros. Studio? A. Yes, sir.

Q. When did you work for Warner Bros.?

A. I started to work in December, 1922, at the Sunset and Bronson lot for Warner Bros.

Q. And in what kind of work?

A. Electrical department.

Q. What was your job?

A. I was an operator.

Q. Lamp operator? A. Yes, sir.

(Testimony of Kenneth B. Coffey.)

Q. And when was the last time you worked at Warner Bros.? A. March 10th, 1945.

Q. Were you a member of any labor organization the last time you worked at Warner Bros.?

A. Yes, sir.

Q. Which one? [753]

A. Local 728. I helped organize the organization.

Q. Of the I.A.T.S.E.? A. I did

Q. And how long have you been employed in motion picture studios generally?

A. Since 1914.

Q. Who was your boss while you worked at Warner Bros., that is, the last time you worked there? A. The last time?

Q. Yes. A. Leon H. Combes.

Q. What is his title?

A. He is supposed to be the chief electrician.

Q. Did you have any other bosses there?

A. Yes, Jack Ohl was assistant to him.

Q. Assistant to Combes? A. Yes.

Q. During the time that you worked at Warner Bros. as a lamp operator, what is the greatest number of operators that ever was working there at one time, to your knowledge?

Trial Examiner Riemer: You mean in the entire studio, Mr. Rissman?

Mr. Rissman: Yes.

The Witness: About 250 or 300.

Q. (By Mr. Rissman): And to your knowledge

(Testimony of Kenneth B. Coffey.)

what is the [754] least number of operators that are normally employed?

A. Approximately 50.

Q. Do you know how many lamp operators there were employed at Warner Bros. while you were working there who had worked there longer than you?

A. Possibly about 20.

Q. Did you go to work on March 12, 1945?

A. I did not.

Q. Did you work on Saturday, March 10, 1945?

A. Yes, I did.

Q. Did you finish your shift on that day?

A. I did.

Q. Were you working as a lamp operator on that day? A. I did.

Q. Did you go to work at any time after March 12, 1945, and during the time that the strike was on at the studios in 1945?

A. You mean at Warner Bros.?

Q. At Warner Bros. A. No. [755]

* * *

Q. (By Mr. Rissman): What was the reason you could not go [756] to work at Warner Bros.?

A. I observed the picket line. I had been on seven strikes before.

Q. When was the first time that you became a member of any labor organization?

A. 1911.

Q. And what union was that?

(Testimony of Kenneth B. Coffey.)

A. 234 of the I.A.T.S.E., Walla Walla, Washington.

Q. Did you become a member of any labor organization in the studios after 1911 and before you became a member of 728?

A. Yes, 1918 in January I became a member of Local 33 downtown.

Q. In the I.A.T.S.E.? A. Yes.

Q. Are you a member of the I.A.T.S.E. at the present time? A. I am.

Q. Of what local? A. 728.

Q. From the first time that you became a member of any local of the I.A.T.S.E. to the present time, has there ever been any period when you were not a member of a labor union and not a member particularly of the I.A.T.S.E.?

A. Yes, when I was in the Army in 1918.

Q. Except for the time that you were in military service, [757] have you always been a member of the I.A.T.S.E.? A. I have.

Q. Did you ever cross a picket line in your life?

A. I never have.

Mr. Luddy: Well, I just want Mr. Rissman to know if he proceeds to open this theory, I want him to understand it is wide open, and he may expect it to be.

Q. (By Mr. Rissman): On March 12, 1945, you say you did not cross the picket line, is that correct?

A. That is right. I had a 7:00 o'clock call in the morning. I saw the picket line and I would not go across it.

(Testimony of Kenneth B. Coffey.)

Q. Were there any other lamp operators present with you who did not cross the picket line on March 12, 1945?

A. Yes, I think there was three.

Q. Who were they?

Mr. Mitchell: Wait. I object to that as being immaterial. We are getting in a lot of other lamp operators who have nothing to do with this case.

Mr. Rissman: I submit it is material, if the Examiner please. We allege in the complaint——

Trial Examiner Riemer: Never mind. I will take it, and unless it is connected with this complaint and this issue I will grant your motion to strike, Mr. Mitchell, if you make one. Go ahead.

Mr. Rissman: May the question be read? [758]

The Witness: Yes.

(The question was read.)

The Witness: You want the names?

Q. (By Mr. Rissman): Yes, the names of the men.

A. Paul Stanley is one of them, Willis F. Howe is the other one, and Lou Krieger and myself.

Mr. Mitchell: Now that we are trying to get outside of the issues and find out about Lou Krieger, I move the testimony about him be stricken.

Mr. Rissman: The mere fact that Mr. Krieger is not named in the complaint does not warrant striking the testimony about him. We are trying to show, Mr. Examiner, and I think we have, that these employees acted in concert. It is not necessary that each one of them——

(Testimony of Kenneth B. Coffey.)

Trial Examiner Riemer: That is enough.

Mr. Rissman: —be a member of the complaint.

Trial Examiner Riemer: The motion to strike is denied.

Q. (By Mr. Rissman): Did you try to go to work on October 31, 1945? A. I did.

Q. What happened on that day?

A. Well, the bunch or crowd of painters and carpenters were gathered on the outside and about 2:30 on October 31 they decided that they were called back to work, everything [759] was settled, so they called us fellows in there and says, "You fellows are going in with us."

Q. By "us fellows" to whom do you refer?

A. The carpenters and painters.

Q. You say they called "us fellows." To whom do you refer?

A. Stanley, Howe and myself. We were the only three there.

Q. And did you go in the studio?

A. We did, went into the time office.

Q. Did you go to work that day?

A. No.

Q. What were you told at the time office and by whom?

Mr. Mitchell: First before we have what you were told, let's have the foundation. I object to it upon the ground no foundation has been laid.

(Testimony of Kenneth B. Coffey.)

Mr. Rissman: I will take the long way around. I will rephrase the question.

Q. (By Mr. Rissman): Did you get in line with the other employees? A. I did.

Q. As you were trying to enter the studio?

A. Yes.

Q. Did you come up to the time window?

A. Yes, sir. [760]

Q. What was being done with respect to these other employees as they came to the time window? Were they given their cards and told to go in?

A. Yes.

Q. Did you get a card? A. No.

Q. Did you ask for one?

Mr. Mitchell: Wait a minute, now. I object to that upon the ground no foundation is laid showing who he is talking to. I am not trying to delay this thing now, but just go at it in the conventional manner and find out who he is talking to, and it would save a lot of time.

Mr. Rissman: O.K., we will do it that way, if you insist upon it, Mr. Mitchell.

Q. (By Mr. Rissman): Was there someone at the time window there? A. There was.

Q. Do you know who it was?

A. No, I don't. I know him when I see him, but I don't know him by name.

Q. You had seen him there before?

A. Yes.

Q. What was he doing?

(Testimony of Kenneth B. Coffey.)

A. He was checking the men in.

Q. Did you talk to him? [761]

A. I did.

Q. What did you say to him?

Mr. Mitchell: Objected to as being immaterial. If it is an attempt to prove an application for employment, it is not the proper way, to go to some clerk and apply.

Trial Examiner Riemer: Overruled.

Q. (By Mr. Rissman): You may answer. What did you say to him?

A. I asked him, I says—he asked me first, he says, “Are you on electrical appointment?”

I said, “Yes.”

He says, “Contact your office.”

Q. What did you do then?

A. Well, I waited for Howe and Stanley, and finally Stanley came out and we were all given the same answers, and Stanley went to the telephone and contacted the inner office and they told him that——

Mr. Mitchell: Wait a minute, now.

Trial Examiner Riemer: Stanley went to the telephone and contacted the inner office period.

Q. (By Mr. Rissman): Did you hear Stanley talk over the telephone?

A. I heard him. He says, “Coffey, Howe and Stanley is out here and we are wanting to go back to work as of March 10th.” [762]

Q. Did you go back to work?

A. No.

Q. Did you ever work in the studios after October 31, 1945?

A. I have.

(Testimony of Kenneth B. Coffey.)

Q. Which studio?

A. Well, I had four days at Republic, about a week at PRC, and then I had just finished 11 weeks at Chaplin's.

Q. Charlie Chaplin? A. Yes.

Q. Are you working now? A. No.

Q. How long ago did you finish working at the Chaplin Studios?

A. Well, about three weeks ago, I guess.

Q. After October 31, 1945, did you ever talk to any other company official at Warner Bros. about getting your job back? A. I did.

Q. To whom did you talk?

A. Mr. Ohl, Jack Ohl.

Q. When did you talk with him?

A. Well, I don't know just approximately the time, but——

Q. How long after October 31, 1945?

A. Well, it was in the neighborhood of about 30 days.

Q. Sometime in November of that year? [763]

A. Yes, sir.

Q. Was it a telephone conversation?

A. No.

Q. You saw him personally?

A. Person to person conversation?

Q. Where did you see him?

A. I saw him in front of Lane's Recreation Hall out there at Burbank.

Q. What conversation did you have with Mr. Ohl?

(Testimony of Kenneth B. Coffey.)

A. I asked him, I says, "Why is it that us boys can't get back to work?"

Q. What did he say?

A. He says, "Well, it is somebody higher up than I am that is keeping you fellows out."

Q. Did you ever have any other conversation with Jack Ohl or any other Warner Bros. official about getting our job back?

A. No, I haven't.

Q. Now, these jobs that you have had at PRC and did you say Monogram?

A. No, Republic.

Q. Republic? A. And Chaplin.

Q. And Charlie Chaplin's Studio, were you called to those through Local 728? [764]

A. No, I was not. I got the jobs myself. Oh, I beg your pardon, Republic, the Local sent me, telephone call and sent me out there for four days.

Q. When was that, approximately?

A. That was in December, I think, 1945.

Q. After the strike? A. Yes.

Q. Did you work in any motion picture studio during the strike in 1945? A. I did not.

Q. Since October 1, 1945, have you always been ready and willing and able to go back to your job as a lamp operator at Warner Bros.?

A. I have.

Q. Are you willing to accept reinstatement to your job at the present time? A. I will.

Mr. Rissman: That is all.

Trial Examiner Riemer: Mr. Mitchell.

(Testimony of Kenneth B. Coffey.)

Cross-Examination

By Mr. Mitchell:

Q. Mr. Coffey, you know there is a picket line now at Warner Bros., don't you?

A. I realize it.

Q. Would you be willing to go through the picket line and go to work? [765]

A. I will not.

Q. In March, 1945, did you know that the I.A.T.S.E. had instructed its members to cross picket lines to keep the studios open?

A. I heard it, hearsay.

Q. Who did you hear it from?

A. Oh, different members of the organization.

Q. Did you place your name in the Local 728 call book following the end of the strike?

A. I did.

Q. And did you keep your name there during your periods of unemployment?

A. I did not.

Q. You mean you only put your name in the call book once? A. Yes, sir.

Q. And that the first call you got was a call to Republic? A. That is right.

Q. And after you were laid off at Republic, did you put your name on the call book again?

A. I did not.

Q. Didn't you want to work?

A. Yes, I wanted work, but I was not going to beg them to give it to me.

(Testimony of Kenneth B. Coffey.)

Q. Well, the way unemployed lamp operators in the motion picture industry get work is to put their name on the call [766] book, isn't it?

A. Well, I got work without calling my local or putting my name on the book.

Q. Were you employed steadily during the early part of 1946?

A. It wasn't necessary.

Q. What wasn't necessary?

A. For me to be employed steadily.

Q. You didn't want to be employed?

A. Not according to the rules and regulations.

Q. What do you mean by that?

A. Well, do I have to beg for a job?

Mr. Luddy: This man is an individualist.

Trial Examiner Riemer: Mr. Coffey, all Mr. Mitchell wants to know is what efforts or attempts you made to get work after October 31, 1945. Just tell him what you did. No attempt is being made to inquire into your personal affairs.

The Witness: That is right. Well, I made several efforts to get work and I worked like at PRC and Chaplin Studio. I even worked up at Inyokern, up at the Naval Base.

Q. (By Mr. Mitchell): But you didn't want to put your name in the call book after the Republic job was finished, is that it?

A. That is right. [767]

Q. Nobody stopped you from putting it there?

A. No. [768]

WILLIS F. HOWE

a witness recalled by and on behalf of the National Labor Relations Board, having been previously duly sworn, was examined and testified further as follows:

Recross-Examination

By Mr. Mitchell:

Q. Mr. Howe, if you were offered a job at Warner Bros. now, would you be willing to cross the picket line at that studio? A. No.

Q. You know there is a picket line now?

A. Yes.

Redirect Examination

By Mr. Rissman:

Q. Would you be willing to go back to work as soon as the picket line is taken off?

A. Yes. [772]

* * *

PAUL DeSANCTIS

a witness called by and on behalf of the National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. Paul DeSanctis.

Q. Mr. DeSanctis, did you work at Warner Bros. before the strike of 1945? A. Yes, sir.

(Testimony of Paul DeSanctis.)

Q. And in what capacity? What was your job?

A. Prop and miniature maker and cabinet maker.

Q. And you worked in the prop shop?

A. Yes, sir.

Q. What kind of work did you do there?

A. Well, the time I was working in the cabinet shop, repairing furniture and making new and different things, that is all. [773]

Q. How long have you been working in the studios altogether?

A. Well, I started since they made the picture King of Kings. I don't remember exactly when that was made.

Q. King of Kings? A. Yes.

Q. That was more than 20 years ago.

A. Yes, every bit of it. I didn't work steady since that time, you know, but since I came back to the studio in 1937.

Q. How long did you work for Warner Bros.?

A. I couldn't say exactly the number of years, about four or five years, I estimate.

Q. When you were working at Warner Bros., were you a member of any labor union?

A. Of the I.A.

Q. I.A.T.S.E.? A. That is right.

Q. Which local? A. 24.

Q. Who was your boss at Warner Bros.?

(Testimony of Paul DeSanctis.)

A. They had a boss, Jim Gibbons.

Q. Now, before the strike of 1945, were you ever asked to work in the carpenter shop at Warner Bros.?

A. Before the strike?

Q. Before the strike. A. No, sir. [774]

Q. Was your work down in the cabinet shop at that time?

A. Correct.

Q. Did you work on March 12, 1945?

A. No, sir.

Q. Did you work on March 13th?

A. I worked that week before, 12 and 19, some time, in the government picture there, but I don't remember exactly the date.

Q. Do you remember when the strike started?

A. The 12th.

Q. The 12th? A. That is right.

Q. Did you work on that day? A. No, sir.

Q. Did you work the next day?

A. I couldn't tell. I got the check I received there.

Q. What does that check show?

A. It don't show the date I worked. It shows the time.

Q. It shows the number of hours?

A. 42 hours.

Q. Does it show on which days you put in those hours?

A. No, it don't show the days I worked, but it was after the 12th.

Q. How long did you continue working after

(Testimony of Paul DeSanctis.)

you went back to work after March 12th? [775]

A. Until the 19th.

Q. And what happened on March 19, 1945?

A. They were called to the meeting, to go to work and take a carpenter job and do anything, we supposed that the studios would go in, so all the bunch of us refused to do so, and so I was one of the bunch. So that was the order. Then in the evening, why, Mr. Gibbons called up and when I was in the office, in front of the office, he gave a blue slip. I say goodbye. [776]

Q. You got your blue slip from Mr. Gibbons that day. Do you have it with you?

A. Yes, sir.

Q. May I see it, please? A. Yes.

Mr. Rissman: Mr. Mitchell, can we stipulate as to what this says, without my reading it into the record?

Mr. Mitchell: Yes.

Mr. Rissman: If the Examiner please, the blue slip is similar to the others which have been testified about, in form. The name is Paul DeSanctis, No. 22743. Date: March 19, 1945. Rate: \$1.71. Occupation: Prop maker. Department: Technical. Remarks: "Refused to do carpenter work."

* * *

Q. Did you go to work at Warner Bros. after the strike?

A. A few days after the strike, yes. I don't remember exactly when it was, but I think it was early in November.

(Testimony of Paul DeSanctis.)

Q. 1945? A. That's right.

Q. What kind of work did you return to?

A. On the same position I had before.

Q. As a—— A. Cabinet maker.

Q. As a cabinet maker in the prop shop?

A. That's right. [778]

Q. After you went to work there, did you have any conversation with Mr. Gibbons?

A. No, I didn't have any, no, just that he was glad to see me, that's all. Shake hands with me, and I went to work.

Q. Have you been working steadily since sometime in November, 1945? A. Yes. [779]

* * *

A. Same as the rest of the bunch; same as the rest of the group.

Q. You did refuse?

A. Well, they didn't ask me personally. The boss asked everybody who wants to go and do the work, and nobody did, so I didn't either.

Q. You were one of those that declined? [783]

A. That's right. [784]

* * *

Cross-Examination

By Mr. Luddy:

* * *

Q. Don't you remember meeting Mr. DuVal down in the hall, at the meeting hall, just about the time the strike ended, and you told him at that

(Testimony of Paul DeSanctis.)

time you still did not want to go back to work, and he convinced you to go back?

A. Just a minute. I will answer that question. A friend of mine by the name of Charlie Jensen—both of us—we didn't come back to work after the strike was over. We had to go through to Warner Bros. studios through the superintendent—what was the name—Fuhrmann, the one that signed the blue ticket. He says to this friend of mine to go to get the permit from the Local to come back to work. So, we went to Mr. Brewer—he done the spokesman—I didn't say anything. I told my story, and then Mr. Brewer sent me to Mr. DuVal. Mr. DuVal says, "Well, we will see what we can do for you two." So, I went home, and Charlie Jensen went home. No sooner I got home than I got a 'phone call. They said to me—Mr. Hill—"Report to work at 7:00 o'clock in the morning." [789]

* * *

Redirect Examination

By Mr. Rissman:

Q. Did you say that you and Mr. Jensen went to see Mr. Fuhrmann about going back to work?

A. Didn't see Mr. Fuhrmann. Mr. Jensen called Mr. Fuhrmann to see if he can take us to work, and he told him—that is what he told me—to go to see Mr. Brewer and Mr. DuVal.

Q. Is that Charles Jensen, Charlie Jensen?

A. Charlie Jensen, yes. [791]

* * *

LEO LEONARD LAMB

a witness called by and on behalf of the National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. Leo Leonard Lamb.

Q. Prior to the strike in 1945, Mr. Lamb, did you work at Warner Bros.? A. I did.

Q. How long did you work there before March, 1945?

A. Something like two years the last time.

Q. What was your job?

A. Prop maker.

Q. How long had you been a prop maker?

A. Since 1922.

Q. How long had you worked in the motion picture industry? A. Since 1922.

Q. While you were working at Warner Bros., what were your particular duties as a prop maker?

A. The greater per cent of the time I was a gang foreman.

Q. What kind of a gang did you direct or lead?

A. Mostly on rigging and submarine work.

Q. Will you describe what you mean by "submarine work"?

A. Making a picture using a submarine, and the action of the submarine and the construction of the different parts were up to the prop shop.

(Testimony of Leo Leonard Lamb.)

Q. Were you engaged in the operation of the submarine while it was being photographed?

A. Partially; not all of the time.

Q. During the time that you worked at Warner Bros., and before the strike, were you ever laid off?

A. I believe once or twice, because I was a "B" member in the union and "A" members complained that I was kept on, although I was a gang foreman.

Q. What kind of work were you doing on March 10, 1945?

A. Working on a government picture, doing miniatures.

Q. What type of miniatures were they? What was their purpose?

A. It was a training film for the Army, I understood, representing fields and terrain, woodland and streams and lakes.

Q. Were you building this miniature?

A. That's right.

Q. How long have you been a member of—strike that. [793] Were you a member of any labor union when you worked at Warner Bros.?

A. That's right, I was.

Q. Which one? A. Local 44 I.A.T.S.E.

Q. How long were you a member of that union?

A. Since 1942.

Q. During the time that you worked in the studios, were you a member of any other union?

A. I was.

Q. Which one?

(Testimony of Leo Leonard Lamb.)

A. 946, Brotherhood of Carpenters and Joiners of America.

Q. How long were you a member of Local 946?

A. Something like twenty years, something like that.

Q. Who is your superior at Warner Bros.?

A. Jim Gibbons.

Q. Did you work on March 12, 1945?

A. That was the date the strike was called?

Q. The day the strike started. A. I did.

Q. How long did you continue working at Warner Bros.?

A. We did not work the 13th, and 14th. I am not sure of the dates. I am not sure of my dates.

Q. What was the last time you worked there?

A. The last time I worked there was the day of the so-called [794] "meetings" with Mr. Brewer, and when we got the blue slips.

Q. Did you get a blue slip?

A. Yes, I did.

Q. Did you get your blue slip on the same day that the other men got theirs? A. I did.

Q. Do you have it with you? A. Yes.

Q. Will you refer to it and tell us what the date is, please? A. 3-19-45.

Q. What is stated on that blue slip as your occupation? A. Prop maker.

Q. And your rate? A. 1.71.

Q. What is typewritten after the printed word "Remarks"?

(Testimony of Leo Leonard Lamb.)

A. "Refused to do carpenter work."

Q. Were you present at the meeting which was addressed by Mr. Fuhrmann on March 19, 1945?

A. I was.

Q. Did you go to work in the carpenter shop on that day? A. No, sir.

Q. Were you ever asked at any time before March 12, 1945, to do work in the carpenter shop at Warner Bros.? A. No, sir. [795]

Q. Did you ever refuse to do any work that was assigned to you at any time before the strike in 1945? A. No, sir.

Q. Why didn't you go to work in the carpenter shop?

Mr. Luddy: I object to the question as immaterial.

Mr. Mitchell: Same objection.

Trial Examiner Riemer: Overruled.

The Witness: I did not care to take another man's job during a labor strike. [796]

* * *

Q. (By Mr. Rissman): Did you make any attempt to get your job back at Warner Bros. at any time? A. Yes, sir.

Q. When?

A. Immediately after the strike.

Q. Who did you see?

A. The day that the boys supposedly all went back to work, we marched in, we prop makers, and were told there were no jobs for us.

(Testimony of Leo Leonard Lamb.)

Q. Who told you that?

A. We were told at the personnel window.

Q. Did you make any other attempts to get your job back?

A. We immediately went to a telephone on the outside and called the department and asked for our jobs back.

Mr. Mitchell: I move that that statement be stricken upon the grounds that no foundation has been laid, and it is not responsive to the question. Departments cannot talk.

Trial Examiner Riemer: Strike it.

Q. (By Mr. Rissman): Who made the telephone call? A. I did. [797]

Q. To whom did you talk?

A. Jimmy Gibbons.

Q. Was this on October 31, 1945?

A. I believe that to be the date.

Q. The day that——

A. The boys went back.

Q. ——the boys went back. What conversation did you have with Mr. Gibbons?

A. Told him that we were there to go to work, and asked him how come the personnel office did not let us in.

Q. What did he say?

A. Referred me to the union. There was no—so far our case has not been settled—there was no opening for me, or something to that effect.

Q. Did you make any other attempts to get your job back?

(Testimony of Leo Leonard Lamb.)

A. I called on several occasions later.

Q. To whom did you talk, and when did you make these calls?

A. I talked to Jimmy Gibbons on one or two occasions, and on at least one occasion to Mr. Fuhrmann.

Q. Do you recall approximately when you spoke to Gibbons after October 31, 1945?

A. Sometime within the coming two weeks this all occurred.

Q. What conversation did you have with him?

A. We asked him if we could have our jobs back.

Q. What did he say? [798]

A. He referred me to Local 44.

Q. Did you also have a conversation with Mr. Fuhrmann? A. I did.

Q. Approximately when?

A. Sometime—this happened within the first two weeks.

Q. Of November, 1945?

A. That is correct.

Q. What conversation did you have with Mr. Fuhrmann?

A. Asked him why we were not permitted with the rest to come back to work, and the way I remember it, he said something about I had better see my local, that he had nothing to say more than that.

Q. How long were you a member—I will with-

(Testimony of Leo Leonard Lamb.)

draw that. Are you still a member of Local 44?

A. No, sir.

Q. When did you cease being a member?

A. Sometime in June, when I was expelled.

Q. June, 1946?

A. That is right, of this year.

Q. Prior to that were you a member in good standing of Local 44?

A. I believe I was behind in my dues a little bit at that time, but prior to three or four months before then I had been in good standing at all times.

Q. Were you in good standing in October, 1945?

A. I was.

Q. Were you willing to perform your own work and accept employment as a prop maker at Warner Bros. at all times after March 19, 1945?

A. I was.

* * *

Cross-Examination

By Mr. Mitchell:

Q. Were you willing between March 19, 1945, and October 31, 1945, to accept employment at Warner Bros. and do carpentry work as instructed?

A. No, sir. [800]

* * *

Q. You say you are willing to accept employment now at [802] Warner Bros.?

A. That is right.

(Testimony of Leo Leonard Lamb.)

Q. Are you willing to cross the picket line there and go to work? A. No. [803]

* * *

Q. Did you attend the meeting at the mill in Warner Bros. studio on March 19, 1945, addressed by Mr. Brewer? A. I did.

Q. Did you attend the meeting at Warner Bros. on March 19 addressed by Mr. Fuhrmann?

A. I did.

Q. He directed the prop makers to do carpenter work, did he? A. That is right.

Q. And you declined?

A. That is right.

* * *

Cross-Examination

By Mr. Luddy:

Q. Mr. Brewer informed you and the others that were there at that meeting that the International president had ordered members of the I.A.T.S.E. to do any work they were requested to do by the studios in order to [804] keep the studios open, didn't he? A. That is right. [805]

* * *

FRED SEWARD

a witness called by and on behalf of the National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. Fred Seward.

Q. Mr. Seward, were you ever employed by Warner Bros.? A. Yes, sir.

Q. When did you work there?

A. I started work in the fall of 1934.

Q. How long did you work there?

A. Approximately eleven years.

Q. What kind of work did you do during the time you worked there? A. Grip work.

Q. Who was your boss?

A. In the earliest or——

Q. The last one, yes.

A. The head of the gang, Ketcham, and my superior boss was Henry Fuhrmann.

Q. What was Ketcham's first name or what is his first name?

A. I am not right sure. We all called him Lamie. Do you [806] know?

Q. Lamie. How long was Ketcham your boss?

A. I don't recall exactly. Approximately——

Q. Approximately.

A. Six years, I think.

(Testimony of Fred Seward.)

Q. Were you a member of any labor organization while you were working at Warners?

A. No, sir.

Q. Which one?

A. The question again?

Q. Were you a member of any union while you were working at Warner Bros.? A. Yes, sir.

Q. Which one?

A. It was two different ones. First it was 37 and then Local 80.

Q. Of the I.A.T.S.E.?

A. Of the I.A.T.S.E.

Q. Were you a member of Local 37 until Local 80 was formed? A. Yes, sir.

Q. And how long did you remain a member of Local 80?

A. I am still a member of Local 80 in good standing.

Q. Where did you perform your work as a grip during the time that you worked for Warner Bros.?

A. Well, first, I started at the Sunset lot. That is on Sunset Boulevard. I worked there until it dissolved and went to First National, that is Warner Bros. at Burbank. I have been there ever since that strike.

Mr. Mitchell: Been there ever since what?

Q. (By Mr. Rissman): You were there up until the strike? A. Until the strike.

Q. Have you worked at Warner Bros. since March, 1945? Let me rephrase the question. Did

(Testimony of Fred Seward.)

you work at Warner Bros. after March, 1945, that is the time of the strike?

A. Well, the 19th was the last day we was asked to do work in the mill, was the last day I worked, whatever date that was; I don't remember, the 19th.

Q. 1945 was the last time you worked there?

A. Yes, 1945.

Q. Did you work on the first day of the strike?

A. Yes, I did.

Q. Did you hear Mr. Brewer talk to the employees on that day?

A. Yes, sir.

Q. Where did he talk to them?

A. In the carpenter shop or mill.

Q. About what time?

A. I think it was approximately 10:00 o'clock.

I am not sure. [808]

Q. In the morning?

A. In the morning.

Q. What were your hours on your shift then at that time?

A. From 6:00 o'clock until—well, it was eight hours, 4:30.

Q. About from 6:00 to about 2:30?

A. 2:30, that is right.

Q. It was an eight-hour shift starting at 6:00 in the morning, is that right?

A. Started at 6:00, eight-hour shift.

Q. How did you happen to be at the studios when Mr. Brewer spoke that morning?

A. I was told by the gang boss to report at the mill.

(Testimony of Fred Seward.)

Q. By which gang boss?

A. I don't recall the name. I don't recall which gang I was in that morning.

Q. Who was present when you got there?

A. There was quite a number of grips there, practically all of the grips that was on the lot.

Q. Was Mr. Brewer there? A. Yes, sir.

Q. What did he say?

A. Well, what I gathered mainly was in what he said that we was expected to keep the studios running and do carpenter work. [809]

Q. How long after Mr. Brewer's speech to the employees did you work for Warner Bros.?

A. Well, I am not right sure. I think it was approximately five days.

Q. Did you get a blue slip? A. No, sir.

Trial Examiner Riemer: What was the answer?

The Witness: No, sir.

Q. (By Mr. Rissman): Were you ever asked to do carpentry work by anyone connected with the studios? A. Yes, I was.

Q. By whom?

A. Fuzzy Fuhrmann in the grip room.

Q. When did Mr. Fuhrmann ask you that?

A. The morning of the day that Brewer was there.

Q. The same day that Brewer was there?

A. Right.

Q. Was it before or after Brewer——

A. After Brewer gave his talk.

(Testimony of Fred Seward.)

Q. What did Fuhrmann say?

A. Well, I don't recall all that he said, other than he said, "You boys is going to keep the studios running and I expect you to do anything you are asked to do."

Q. Did he say anything about going in the mill or carpenter shop? [810]

A. Not at that time, I don't recall.

Q. Did you ever discuss your going into the mill or carpenter shop with any other of your superiors at Warner Bros.?

A. No, I never, not with any of the superiors. I talked with some of the boys.

Q. Well, did you have any conversation with Mr. Ketcham about it?

A. Nothing. He told me that I had to go into the mill, and I told him how I felt.

Q. Well, tell us what you told him and what he said to you, and tell us where it was.

A. Well, we had the call come down that we was to go to the mill, the men on the gang, and I walked to the grip room and took off my overalls and went up to the stage where Ketcham was and told him that I didn't feel right doing carpenter work and that I was not going to do it, I was going home. [811]

He says, "Well, you will have to go to see Mr. Fuhrmann," he says, "he is in the mill."

Q. Did you tell Mr. Ketcham why you would not feel right doing carpenter work?

(Testimony of Fred Seward.)

Mr. Luddy: May we have an answer yes or no to that question?

Trial Examiner Riemer: Answer that yes or no.

The Witness: What was the question again?

Trial Examiner Riemer: Read the question.

(The question was read.)

The Witness: I figured——

Q. (By Mr. Rissman): Just answer that yes or no, the Examiner said. Do you want to hear the question again?

A. Yes, I didn't get it. The question, please.

(The question was re-read.)

The Witness: I did.

Q. (By Mr. Rissman): What did you tell him?

Mr. Luddy: We will object to that as being immaterial.

Mr. Mitchell: Same objection.

Trial Examiner Riemer: Overruled.

Q. (By Mr. Rissman): You may answer now, Mr. Seward.

A. I told him that I thought it was not right and it was, to me it was the same as scabbing.

Q. Did you go to see Mr. Fuhrmann after Mr. Ketcham asked you to? [812]

A. I did.

Q. And where did you see Mr. Fuhrmann?

A. He was in the mill.

Q. What conversation did you have with him?

A. I asked him for a blue slip and he said, "We are not giving blue slips."

(Testimony of Fred Seward.)

Q. Is that the first thing you said to him when you came up to him? A. I don't recall.

Q. That is, not the exact language if you don't recall, but in substance when you came up to Mr. Fuhrmann, tell us what you said to him and what he said to you.

A. I said I didn't feel right going to work in the mill and I would like to have a blue slip. He said, "Well, I am sorry, I can't give you a blue slip. You will have to go see your local."

Q. Did you work at Warner Bros. during the strike after this conversation with Mr. Fuhrmann?

A. No, sir.

Q. Do you recall on what day you had your conversation with him, keeping in mind that the strike started on Monday, March 12, 1945?

A. No, I do not. I do not recall the date.

Q. Do you recall what day of the week it was?

A. Monday, I think. [813]

Q. Did you ever go back to Warner Bros. and try to get your job after the strike ended?

A. The day that the boys went back to work I went in and saw Mr. Ketcham. He says, "There is no job for you." He says, "Give me your telephone number and I will call you."

Q. Did you ever get a call from Warner Bros. to come back to work? A. I did not.

* * *

Q. After March 19, 1945, were you willing to go back to work at Warner Bros. to the job that you had when you left there?

(Testimony of Fred Seward.)

A. Yes, after a period of about three months I would have went back.

Q. Well, at any time, did you decided that you would not have gone back?

A. After May, I don't know what date in May, I would not have went back.

Q. May of what year?

A. 1945—or 1946 I should say, this spring. [814]

* * *

Q. What happened in May, 1946?

A. I bought a ranch at Beaumont, California, a fruit orchard.

Q. And are you still operating that ranch? [815]

A. Yes, sir.

Q. Where is Beaumont, California, with respect to Hollywood?

A. About 83 miles from Los Angeles east. [816]

* * *

WILLIAM J. SIMPSON

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. William J. Simpson.

Q. Mr. Simpson, were you ever employed at Warner Bros. Studio?

A. Yes, sir, I was.

(Testimony of William J. Simpson.)

Q. When were you employed there?

A. I was first a member, I believe in June, 1933.

Q. How long did you work there?

A. Up until March 19, 1945. [820]

Q. What kind of work did you do?

A. Well, I did grip work, and then I transferred over to Local 44.

Q. When did you transfer over to Local 44?

A. I believe in 1936.

Q. What kind of work were you doing there when you were last working there?

A. At Warner Bros?

Q. At Warner Bros.

A. I was in charge of what they classified as the special effects department.

Q. How long had you been in charge of the special effects department?

A. From two months after I joined the department up until the time that I was discharged.

Q. That would be some time in 1937 until March, 1945?

A. Well, it would be more than that. I believe I entered the department in February, 1937, and then I worked nights for about two months, and then the emergency arose whereby they changed me over to days, and had me take charge of the special effects department.

Q. What was your work in the special effects department?

A. Well, taking charge of all special effects

(Testimony of William J. Simpson.)

which come under the departmental—you know, the department's jurisdiction. [821]

Q. Will you tell us what you mean by "special effects"?

A. Well, that has to do with all the effects work pertaining to the company requirements, ordering, the preparation of special units to be built, supervising the rigging and the operations and the mechanical effects of the various items that are used to be operated during the picture. It runs into most of those things.

Q. During the time that you worked at Warner Bros., were there ever any complaints made to you about your work? A. Not to my knowledge.

Q. Were you ever disciplined or reprimanded with respect to your work?

A. Never, to my knowledge.

Q. Or with respect to your conduct in the shop?

A. Never, to my knowledge.

Q. If it had happened, you would know about it?

A. Oh, I presume I would have, yes, sir.

Q. Were you ever asked to do any work in the carpenter shop at any time before the strike of 1945? A. No, sir.

Q. Before the strike of 1945, did you ever refuse to do any work that was assigned to you?

A. No, sir.

Q. In the special effects department, was there anyone above you in that type of work? [822]

A. Not as far as the labor was concerned. There was a department head, of course.

(Testimony of William J. Simpson.)

Q. Who was that? A. Mr. Gibbons.

Q. Did you work during the week of March 12, 1945, the first week of the strike?

A. Yes, sir, I did.

Q. Did you work the week before March 12th?

A. Yes.

Q. Did you work on March 19, 1945?

A. Yes, sir, I did, because I remember that is the day I was discharged.

Q. What kind of work were you doing on that date?

A. Well, at that time I think it was just an incidental assignment. I had just finished a show about ten days prior to this particular incident, and since I was the key man there, why, it was just incidental work. I believe it was preparing a processed body that had been purchased and was going to be prepared and used for future use.

Q. It was work in the prop department?

A. Oh, yes.

Q. Did you attend any meeting of prop makers in the shop that was addressed by Mr. Brewer on March 19th? A. No, sir.

Q. Did you hear Mr. Fuhrmann address the employees on that [823] date? A. No, sir.

Q. You say you were discharged on March 19th?

A. I believe that is the—I recall that that was the date stamped on my discharge slip.

Q. Did you get a blue discharge slip?

A. Yes.

(Testimony of William J. Simpson.)

Q. Do you have it with you? A. Yes, sir.

Q. Will you please refer to it and give us the date and other information?

A. March 19, 1945.

Q. What is stated on the blue slip as your occupation? A. Prop maker.

Q. What is your rate as indicated on the slip?

A. \$1.95.

Q. What is typewritten after the printed word "Remarks"?

A. "Refused to do carpenter work."

Q. By whom is that slip signed?

A. F. C. Fuhrmann. [824]

* * *

Q. Did Mr. Fuhrmann or Mr. Gibbons or any other studio official or executive ask you to do carpenter work? A. Mr. Fuhrmann did.

Q. When?

A. I believe it was March 19th, the day that we were discharged. [825]

* * *

Q. Did you try to get your job back at any time after March 19, 1945?

A. Oh, yes, several times.

Q. When, and what did you do?

A. Well, I started out by trying to get the various officials on the telephone, which I had no luck in doing that at all, and then I thought by writing them a letter they would at least get the letter,

(Testimony of William J. Simpson.)

which I assume that they did, but they were never answered.

Q. Did you write a letter?

A. Oh, yes, I wrote several letters.

Q. Do you recall approximately when you wrote the letters?

A. Not the dates, I don't, no.

Q. How long after the end of the strike?

A. It was immediately after the strike.

Q. Did you get any replies? A. No

Mr. Mitchell: That is indefinite. Immediately after the strike would be March 13th.

The Witness: No, I mean the settlement of the strike.

Q. (By Mr. Rissmann): Immediately after October 31, 1945? A. Yes.

Q. Did you get any replies to those letters?

A. No, sir. [828]

Q. Were the letters addressed to any particular person, or just to the studio?

A. Mr. Fuhrmann.

Q. Do you have any copies of those letters?

A. No, sir, I don't.

Q. Did you make any copies of those letters?

A. No. At the time I did not think it was necessary.

Q. Are you still a member of Local 44?

A. Yes, sir, I am.

Q. Have you always retained your membership in good standing? A. Yes, sir.

(Testimony of William J. Simpson.)

Q. Did you talk to any officials of Local 44 with respect to getting your job back at Warner Bros.?

A. Well, not directly as to getting my job back, but I expressed a desire of going back to Warner Bros., which I always felt that I would have liked to have done.

Q. To whom did you express that?

A. Mr. DuVal, the business agent for the local.

Q. What did Mr. DuVal say?

A. He was very much in favor of it at that time.

Q. When was it, approximately?

A. The approximate date——

Q. In relationship to the end of the strike on October 31, 1945, when was it? [829]

A. Well, I would say it was possibly within 60 days after the settlement of the strike. I wouldn't want to even hazard a guess as to the exact date.

Q. What did Mr. DuVal say?

A. Well, he was quite in favor of it. I mean, the result was—that was the reason why I had a talk with him, because I wrote a letter. In the meantime the rumors were that boys in my particular category were forbidden from going to work, and then finally I had found out that they were not permitted to put their names on their call book, and I found that out to be true, and the result was that I felt that I should pay a visit down to the local office and find these things out for myself, and that people would know. So, the result was, that was the reason for one of my letters to Mr. Fuhr-

(Testimony of William J. Simpson.)

mann, to inform him that I was cleared through the local. I mean, it finally brings us up to that point, that I was cleared through the local, and that my desire was to go back to work at Warner Bros., and I so stated in the letter.

Q. Did you work at any motion picture studio during the strike?

A. No, sir. I was unable to, for a while.

Q. Because of your health?

A. Well, my being discharged at Warner Bros. made me very ill. [830]

Q. Did you work at any motion picture studio after October 31, 1945?

A. No, sir, other than the studio I am employed at now.

Q. Where are you employed now?

A. Enterprise Studio.

Q. How long have you worked at Enterprise?

A. I have been there since approximately March—oh, the 19th, I believe.

Q. 1946? A. Of this year, '46.

Q. What kind of work are you doing there?

A. I am working in the prop shop; prop maker.

Q. After March 19, 1945, were you willing to accept reinstatement to your former job at Warner Bros.?

A. Any time after March 19, 1945?

Q. Yes.

A. Yes, I was very willing to accept it, as a prop maker.

(Testimony of William J. Simpson.)

Q. Were you willing to accept such work as a prop maker at Warner Bros. after October 31, 1945? A. Yes. [831]

* * *

PAUL L. STANLEY

a witness called by and on behalf of the National Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. Paul L. Stanley.

Q. Mr. Stanley, were you ever employed at Warner Bros. A. Yes.

Q. Before the strike of March, 1945, how long did you work at Warner Bros.?

A. Well, up until the time that Warner Bros. took it over, I was working for First National, and Warner Bros., since 1926, approximately August 20th.

Q. What kind of work did you do?

A. Electrical, that is all.

Q. Can you describe that in more detail?

A. Well, First National was telephone, machine shop, that is electrical machine shop, and rigging and operating.

Q. Well, what kind of work were you doing the last five or six years before the strike of 1945?

(Testimony of Paul L. Stanley.)

A. Rigging and what we called special operator.

Q. Is that lamp operator? A. Yes.

Q. And who was your boss the last time you worked there before the strike?

A. You mean the foreman or the head boss?

Q. Well, both.

A. Well, Slats Comes or S. L. Comes, and Paul Burnett.

Q. How long had Comes been your superior?

A. Since 1933.

Q. Was Jack Ohl also one of your bosses?

A. Yes, he was the assistant to Slats Comes.

Q. What was your classification while you were working there before the strike?

A. Operator or electrician, either way. That operator I mean to say is a lamp operator.

Q. While you were working there, were you a member of any labor organization?

A. I.A.T.S.E., Local 728.

Q. How long were you a member of Local 728?

A. 1936.

Q. Before that, were you a member of any local of the I.A.T.S.E.? A. No.

Q. Did you work at any time during the strike of 1945?

A. Yes, up until the first of October, when the violence [905] started.

Q. What kind of work were you doing during the strike? A. Special operator.

Q. The same work you had been doing before?

(Testimony of Paul L. Stanley.)

A. Yes.

Q. Did you stop coming to work at any time during the strike? A. You mean up to the——

Q. Up to the time you say you worked until about the first part of October. A. Yes.

Q. 1945?

A. I hadn't stopped before that, no.

Q. But you did stop at about that time?

A. At about that time.

Q. Were you ever asked to do any work other than lamp operating? A. Yes.

Q. By whom? A. Slats Comes.

Q. What did he ask you to do and when did he ask you to do it?

A. Well, about in a week's time he asked me about three times.

Q. Which week? [906]

A. It was just shortly before the violence part, within 15 or 20 days, something like that.

Q. When you say the violence part, to what time do you refer?

A. Oh, approximately the 5th or 6th of October, whenever it started.

Q. What did Comes ask you to do?

A. To go into the mill as a morale builder for the I.A.T.S.E.

Q. What did you tell him? A. No.

Q. Did you say anything else?

A. Yes, I told him I didn't believe it was the right thing to do.

(Testimony of Paul L. Stanley.)

Trial Examiner Riemer: What is meant by the mill, Mr. Stanley?

The Witness: Oh, the carpenter work and that sort of thing, prop making and——

Q. (By Mr. Rissman): Is the mill the term used to refer to the carpenter shop?

A. The carpenter shop, prop making, and the—let's see, who is there—Hentschel is in the—not miniature—well, just general carpenter work, you know, cover the whole field of motion picture.

Q. Had you ever done carpenter work in a motion picture [907] studio? A. No.

Q. Before the strike of 1945, did anyone at Warner Bros. ever ask you to do carpenter work?

A. Well, to actually do carpenter work, the request or the insistence on going down to the mill as morale builder, not necessarily to handle tools or anything but to be there, and if I wanted to, to go ahead and do carpenter work, which a lot of other fellows did.

Q. You say that is what Comes asked you?

A. That was the request, yes.

Q. After you left the studio in the first part of October 1945, you stayed out for the balance of the strike, is that right? A. That is right.

Q. Did you attempt to go back to work when the strike was over? A. That is right.

Q. When?

A. When the deadline to go back in, everyone to go back in, we went in with them, and went up to get our call and we were told to call the office.

(Testimony of Paul L. Stanley.)

Q. Before we get to that, do you recall when that was?

A. Well, when—well, that was the final day of the strike. [908]

Q. Was it the day everybody was to go back?

A. Supposed to go back, yes.

Q. And were you outside of the studio on that day? A. That is right.

Q. Tell us what you did with respect to going back or trying to go back to work.

A. Well, when the O.K. to go in came through, we went through in respective lines according to our crafts, and so we were in the electricians'.

Q. When you say "we were in the electricians'," who was that?

A. Well, that was myself, Coffey, Willis Howe, and several others that stayed out there in a different local, like the I. B. E. W., and we went into our particular window to get our call and we were told to call the office.

Q. By whom were you told to call the office?

A. One of the timekeepers.

Q. Do you know his name?

A. No, I don't.

Q. What did you do after that?

A. When we were told to call the office I went over to the phone with Willis Howe and Coffey and called the office, and if I remember right—

Q. Which office did you call?

A. The electrical. [909]

(Testimony of Paul L. Stanley.)

Q. That is the office of your department?

A. That is right.

Q. All right, and to whom did you talk?

A. Well, if I remember that right, it was Hack Boes.

Q. What did he do in the department?

A. He is, I guess, you would call a call boy, as you might say. In other words, he gives out the calls to the—well, call him the assistant to Jack Ohl.

Q. You started to say give out the calls to somebody?

A. Well, whenever the companies as we call it fold, they would go to this window and he would give them their respective calls, and as to the time anywhere from 6:00 o'clock in the morning to whatever the company call would be.

Q. When you say he would give them their calls, you mean by that he would tell them when to report for work?

A. The next day.

Q. Is *that is* meant by the expression "giving a call?"

A. Giving them a call, right.

Q. What conversation did you have with Mr. Boes at that time over the telephone?

A. I asked him about a call and he said—I asked him, I said, "I am talking for Willis Howe and Ken Coffey," and he said, "Just a minute." And I heard him talk with his hand evidently over the phone or the transmitter, and he said, "I will talk

(Testimony of Paul L. Stanley.)

to Slats," and he said, "No call." That [910] was it definitely, no call.

Q. Were Howe and Coffey with you when you had this conversation?

A. Yes, right with me.

Q. Did you tell them what Boes had said?

A. Yes.

Q. What happened after that?

A. We went outside and talked to several of the painters across the street that had not gotten into—gotten through yet, because there were several hundred people, and told them what happened and so——

Mr. Mitchell: Wait a minute. I object to the conversation with the painters across the street.

Trial Examiner Riemer: Sustained.

The Witness: Well, they should be across the street. The line was about 250 feet long.

Trial Examiner Riemer: No.

Q. (By Mr. Rissman): Did you ever get back to work at Warner Bros. after that?

A. Yes, through a call to 728.

Q. To the local? A. Yes.

Q. In all the time that you worked at Warner Bros. before the strike, had there been occasions when you were off of work because the particular job or particular picture had [911] been finished?

A. Only at my own will.

Q. Were you ever laid off? A. No.

Q. In the last five years of your employment?

(Testimony of Paul L. Stanley.)

A. Well, in five years I imagine I lost out say two weeks. That is just quiet. The rest of it I took off of my own.

Q. When you worked there before the strike, how did you get your calls with respect to when you should come to work after completing one picture and before starting on another?

A. Well, as we call them best boys, he is actually the assistant foreman, we would get the call at the finish of the day of what to do for the next day.

Q. Was it ever necessary for you to go through Local 728?

A. No, not until after the strike I never had a call from the local at any time.

Q. What kind of card did you have in Local 728? Was it an A card or a B card?

A. It was a full-fledged member in good standing.

Q. Did you remain in good standing at all times?

A. Yes.

Q. Until how long?

A. Up until—well, I don't know whether I am—I should be in good standing yet.

Q. Have you ever been advised by anyone from the local [912] that you were not in good standing?

A. No.

Q. When did you get the call from Local 728 to go to Warner Bros. after the strike?

A. I called the local.

Q. When was it approximately?

(Testimony of Paul L. Stanley.)

A. Oh, approximately about two weeks after the strike.

Q. And did you go to work?

A. Well, I called the local and they would say, "Well, there is calls at the various studios." I just asked, "How about Warner Bros?"

"Well, there is a call there for you if you want it."

I said, "I will take it."

Q. Did you take it?

A. Yes, I went over there.

Q. How long did you work? A. One day.

Q. Do you recall approximately when that was?

A. Just about two weeks after the strike.

Q. Did you get any other calls at Warner Bros. afterward? A. The same way.

Q. When was the second call?

A. About two or three days later. They have the record of that.

Q. Well, what is your recollection as to when it was?

A. Well, it has been some time, you know. [913]

Q. What is your best recollection? Was it a few days after the first call?

A. Yes.

Q. And how long did you work the second time? A. One day.

Q. When you came back there on these two occasions for one day each, did you observe or see whether there were any other lamp operators working? A. Permit men.

(Testimony of Paul L. Stanley.)

Q. Do you know how many you saw that were permit men?

A. It's hard to tell when there are seven or eight companies going, you know. Oh, I'd say an average for the six days—I'm pretty sure it was six days I worked—I imagine that there was 60 to 100.

Q. You say you worked six days at Warner Bros. altogether?

A. Spaced out.

Q. From the middle of November 1945 until when, over how long a period?

A. About—oh, between three and four weeks.

Q. Did you ever work more than one day at a time?

A. I had two consecutive days but both were through the local.

Q. You didn't get the call at the end of the first day to come back the second?

A. No. [914]

Q. As you had in the past?

A. That's right.

Q. Did you ever talk with any of the Warner Bros. officials or your superiors about reinstatement to your regular position as a lamp operator?

A. Yes, Jack Ohl.

Q. When did you talk with Jack Ohl?

A. Oh, in the six days I was there I guess I talked to him about three times.

Q. What conversation did you have with him?

A. I asked him what the trouble was, why I wasn't back in and in my old position. He says,

(Testimony of Paul L. Stanley.)

“It’s out of my hands. I can’t do anything about it.”

I tried to talk to Slats and he wouldn’t talk—not about that, anyway.

Q. That’s Slats Comes? A. Yes.

Q. After October 31st, 1945 were you ready, willing and able to go back to your regular position as a lamp operator?

A. Yes, under the same standing I had had prior to that.

Q. Are you willing to go back now?

A. No. [915]

* * *

Cross-Examination

By Mr. Mitchell:

Q. Prior to the strike, Mr. Stanley, which shift did you work on? A. Day.

Q. Was that true for some time prior?

A. Yes. It was, oh, a good three years.

Q. Working on the day shift?

A. That’s right.

Q. That starts when?

A. Well, anywhere from 6:00, 6:30 to 7:00, 7:30, 8:00, and work as late as 6:00, 7:30, and maybe later, depending on what the shots were.

Q. Were you going to school somewhere during that period of time? [916]

A. Yes, medical school.

Q. What time did you go to medical school?

(Testimony of Paul L. Stanley.)

A. 8:00 o'clock in the morning until noon. That was about a year—not quite a year.

Q. During what period of time did you go to medical school?

A. Let's see, it was September of 1944 until about—well, until summer school of 1945.

Q. How many days a week did you go to school?

A. Five.

Q. And your hours were 8:00 until when?

A. Until noon.

Q. And then you worked on the day shift at Warner Bros. during that period of time?

A. Yes, until the shooting time closed, and I had access to, or privilege of working at night if I wanted to, which I did a few times but I had to study too, so I had to let that—

Q. I'm confused as to how you worked at Warner Bros. on the day shift and also went to school from 8:00 until 12:00.

A. Well, that was a little out of the ordinary at that particular time because when I started to school, Jack Ohl and I made a little deal on it. Naturally I couldn't come from Glendale Junior College when I got off at noon and get there at noon at the studio, so he said, "Get in here as [917] fast or as quick as you can. Get your lunch and come in."

And then I could go a little farther, but that is a lot of stuff—a lot of that stuff wasn't supposed to be known by Slats Comes; that is, only in a decent

(Testimony of Paul L. Stanley.)

way. In other words, as long as he didn't know it, well, he didn't care. That was up to the time of going to school, but prior to that I worked the whole day shift.

Q. Let's take this time which you were going to school. What time did you report to the Warner Bros. Studio?

A. Anywhere from 12:30 to 1:30.

Q. And how long did you work?

A. I worked until 6:00 o'clock or 9:00. [918]

* * *

Q. Now, after the strike ended on October 31, 1945, when was the first time that you went to the union to try to get a call?

A. About three days.

Q. Did you place your name on the 728 call book?

A. No. I did it by call—telephone.

Q. Telephone? [921] A. Yes.

Q. And whom did you talk to?

A. One fellow was Hawk, and I don't remember the other fellow's name. I know him well, though.

Q. What did you tell him?

A. Well, I asked for a call to go to work after the fracas was all over and he named various studios and I asked him about Warner Bros. He says, "All right, there is a call for 7:30" or approximately that time.

(Testimony of Paul L. Stanley.)

I said, "I'll take it" just to try to get back in there to talk to somebody.

Q. And you went to Warner Bros.?

A. I went to Warner Bros.

Q. And worked there that day?

A. That day only at that time.

Q. And then what happened at the end of that day at Warner Bros.?

A. Well, I went to get my call and that was it—no call.

Q. There was no call for you the next day?

A. That's right, and permit men were getting them.

Q. So you went back to the union again?

A. Well, by telephone. All my calls to the union were by telephone.

Q. You called the union the next day?

A. Or that night, rather. [922]

Q. Did they offer you a job the next day?

A. Yes, I went to Republic.

Q. I see, and how long did you stay at Republic?

A. Three or four days and I called that night and went back to Warners.

Q. And you stayed one day at Warners that time? A. That's right.

Q. And there wasn't any call for you at Warners next day? A. Right.

Q. And you called the union again?

A. That's right.

Q. Where did you go next?

A. Paramount.

(Testimony of Paul L. Stanley.)

Q. The next day? A. Right.

Q. And how long did you work at Paramount?

A. Two days.

Q. There was no call for you at the end of two days?

A. The pictures folded and they cut the crews so that is why I was off.

Q. So then you called the union again?

A. Right.

Q. Did they send you out to another job?

A. I went to Warners.

Q. And you worked there one day? [923]

A. That's right.

Q. And no call for you at the end of the day?

A. That's right.

Q. So then you called the union again?

A. Right.

Q. Then where did you go?

A. Warner Bros.

Q. All right, you worked there a day and what happened at the end of that day?

A. No call.

Q. All right, you went back to the union again?

A. Right.

Q. You called them? A. Right.

Q. Did they send you some place the next day?

A. I went to Monogram.

Q. Did the union keep you continuously employed? A. Right.

Q. Until when?

A. Until I decided I had had enough.

(Testimony of Paul L. Stanley.)

Q. When was that?

A. Oh, last March. Wasn't that the date I gave a little while back—March or April—April.

Q. Well, you kept employed from the end of the strike until March or April? [924]

A. There were a few days that I didn't work.

Q. A few days that you didn't work?

A. Yes.

Q. Until March or April? A. Right.

Q. Then what did you do?

A. Went into business—automotive.

Q. Automotive business for yourself?

A. Right.

Q. And after that you didn't want any more calls, is that right?

A. Why should I?

Q. I don't know about it, Mr. Stanley, but I take it you didn't want any more calls after that?

A. No, I didn't want any more calls, not under those circumstances. [925]

* * *

Mr. Mitchell: In order to save the time of Mr. Pelton, whom Mr. Rissman has asked to be brought in, I have offered to stipulate that Mr. Pelton, if called as a witness, would testify in response to the questions asked in Case No. 21-C-2735 just as he did in that case, subject, however, to such objections as I may want to make in this case as to the materiality of certain of the questions, which Mr. Rissman may want to have read into the record

here, and then if there are additional facts that he wishes to elicit from Mr. Pelton, Mr. Pelton will be here to give those additional facts.

Mr. Rissman: What Mr. Mitchell said is correct. I am willing to enter into such a stipulation, but without knowing [930] the nature of any particular objection until it is made, it may be that a ruling on a particular objection may have the effect of putting me in a position where I won't be able to stipulate further, because the particular ruling or the particular objection would have changed the type of questions asked if Mr. Pelton were actually here, from what he was asked when he testified on September 10, 1946, in Case 21-C-2735. We are going to get started and see how far we get along with it.

Trial Examiner Riemer: This is being done in order to cut down the time that Mr. Pelton would spend here.

Mr. Rissman: That is right.

Trial Examiner Riemer: He is being called in any event this afternoon to testify, in addition, to other matters, isn't that correct?

Mr. Mitchell: That is right.

Trial Examiner Riemer: Is there any reason, then, why those questions could not be propounded again to Mr. Pelton, reserving the right, of course, of Mr. Mitchell to object, and the ruling would be made then? What you propose, I think, will cut down substantially the testimony and the length of time he would spend here.

Mr. Rissman: I am going to start reading at page 683 of the transcript in that other case. The witness was sworn and testified on direct examination in response to questions by [931] me as follows:

"Q. Will you state your name, please?

"A. Fred E. Pelton.

"Q. Where do you live, Mr. Pelton?

"A. 102 North Rockingham, Los Angeles 24.

"Q. What is your business or occupation?

"A. I am a motion picture executive.

"Q. And by whom are you employed?

"A. I am the Producers' Labor Administrator.

"Q. Will you explain what that means?

"A. That means the negotiations, contracts, interpretations, and the preparation of labor contracts.

"Q. For which Producers?

"A. The ten major producers.

"Q. Will you name them?

"A. Well, I don't know their legal names. M. G. M., Fox, Paramount, Warner Bros., R. K. O., Columbia, Universal, Republic, Goldwyn and Roach.

"Q. How long have you represented those Producers?

"A. Since October 1939, as I recall the date.

* * *

"Q. What are you empowered to do with respect to labor matters on behalf of the employers you have named?

"Mr. Mitchell: What employers does that mean? The Producers, you mean?

"Mr. Rissman: Yes, The Producers and the Association.

"The Witness: Well, we function through a labor committee, and I am directly under the chairman of that for execution of whatever they have negotiated. I prepare the contracts and then later interpret them.

"Q. Are these Producers you have named members of the Association of Motion Picture Producers, Inc.? A. I think so.

"Q. Do you represent in labor matters, as you have described, all of the members of the Association of Motion Picture Producers, Inc.?

"A. Yes. Well, there have been times where certain members have been out, and then came in again. But I mean one that is an active member, I represent in the [934] negotiations.

"Q. Do you represent any producers other than those you have named? A. No.

"Q. I am not trying to limit you to their legal titles. You have named them by their popular names, is that right? A. That is right.

"Q. Have you been employed by the Association continuously since some time in October 1939?

"A. Well, I was employed by the Labor Committee in 1939. Now, what has happened so far as the Association, they have nothing to do with my activities, as an Association.

“Q. What do you mean by that?

“A. I mean by that this: I was interviewed by the Chairman of the Labor Committee, and referred to two other members.

“Q. Who was that?

“A. At that time I think it was either Mr. Silberberg or Mr. Freeman; but the three members of the Committee in 1939 were Freeman, Mannix and Silberberg.

“Q. Mr. Freeman has been identified in this record as an official of Paramount, is that right?

“A. Yes, that is right. [935]

“Q. And Mr. Mannix is from what studio?

“A. M. G. M.

“Q. M. G. M. That is Loew's? A. Yes.

“Q. Who is Mr. Silberberg?

“A. He was at Columbia at that time.

“Q. Go ahead. I interrupted you.

“A. There has been no lapse in my employment since that date some time in October 1939. [936]

* * *

Mr. Mitchell: We offer the same stipulation with respect to Pat Casey's testimony.

“PAT CASEY

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, [943] was examined and testified as follows:

“Direct Examination

“By Mr. Rissman:

“Q. Will you state your name, please?

“A. Pat Casey.

“Q. Where do you live, Mr. Casey?

“A. 724 North Foothill Road Beverly Hills, California.

“Q. What is your business address?

“A. 5504 Hollywood Boulevard.

“Q. Is that the same address as the Association of Motion Picture Producers, Inc.?

“A. They are in the same building.

“Q. What is your occupation or business?

“A. I am the chairman of the Producers Committee.

“Q. What is the Producers Committee?

“A. It is a committee of the presidents of the major motion picture companies operating in Hollywood and vicinity.

“Q. Who are the members of that committee at the present time?

“A. Mr. Nicholas Schenck, Mr. Spyrous Skouras—

“Q. As you name each of these men, will you indicate which studio they are affiliated with?

“A. Yes. Mr. Schenck, M. G. M. Mr. Skouras, Twentieth [944] Century-Fox. Peter Rathvon, R. K. O. Mr. Harry Warner, Warner's. Frank Freeman, Paramount—no, Barney Balaban, Paramount. Mr. Nate Blumberg of Universal. Mr. Yates of Republic.

"Q. Do you know his first name?

"A. Herbert. How many is that, please?

"Q. That is seven.

"A. Harry Cohn of Columbia, and Hal Roach of Hal Roach Studios. Samuel Goldwyn of Goldwyn Studios. I think that takes them all.

"Q. That is 10. Are there any others?

"A. I don't think there are.

"Q. How long have you been chairman of that committee? A. Since 1928.

"Q. Are you associated with any particular motion picture studio? A. No, sir.

"Q. What is your relationship or connection with the Association of Motion Picture Producers, Inc.? A. None. [945]

* * *

"Q. What occurred in March 1945, if anything, with respect to the agreement?

"A. I believe there was a strike in the studios.

"Q. You are now referring to the strike which started on March 12, 1945? A. Yes, sir.

"Q. This strike that started on March 12, 1945, by whom [951] was that called?

"A. By the, I think, the number is 1421.

"Q. Of which union?

"A. I call them draftsmen. Wait a minute, I will give you the name they called them. They called them Screen Set Designers.

"Q. Affiliated with the Painters International Union, A. F. of L.? A. Yes, sir.

"Q. How long did that strike last?

"A. About eight months, I think.

"Q. It was terminated on October 31, 1945, was it not?

"A. I believe that is the date.

"Q. Did any labor organizations refuse to work to your knowledge? A. Yes, sir.

"Q. During that strike? A. Yes, sir.

"Q. Which ones?

"A. Machinists and Carpenters refused to work during that strike.

"Q. Who else?

"A. Painters refused to work during that strike.

"Q. Any others? [952]

"A. Yes, I believe that practically all members of the Conference Unions did not work during that strike.

"Q. Will you state for the record what the Conference Unions are?

"A. The painters, carpenters, 1421 of the set designers, the publicists, the readers, and at the time of the strike I am pretty sure the office workers were.

"Q. Will you explain more fully what the Conference is, to your knowledge?

"A. It is an association of these different unions.

"Q. Have you negotiated with officers of that association on behalf of the member unions and your member employers? A. Yes, sir.

"Q. With what officers of the association particularly have you been in negotiations

"A. Mr. Herbert Sorrell.

“Q. And his title is what?

“A. I think it is president of the Conference.

“Q. What is the official name of this Conference?

“A. Conference of Studio Unions, C.S.U. [953]

FRED E. PELTON

a witness called by and on behalf of the National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. Fred E. Pelton.

Q. Mr. Pelton, directing your attention to the strike in the motion picture industry which started March 12, 1945, and ended October 31st of that year, what were you doing at that time? What was your business or occupation?

A. I was producers labor administrator.

Q. That was the position you had held for some time prior to that time?

A. Correct.

Q. And which you now have?

A. Correct.

Q. You have testified earlier with respect to all of your various duties in that capacity. I will ask you if as the producers labor administrator you have appeared on behalf of producers who are members of the Association of [958] Motion Picture Producers, Inc., before officers of the National Labor Relations Board?

(Testimony of Fred E. Pelton.)

A. I think so, on several occasions.

Q. And have you acted as observer in elections conducted by the Board among certain employees of those producers?

Mr. Mitchell: Objected to as immaterial.

Trial Examiner Riemer: Sustained.

Q. (By Mr. Rissman): In what capacity have you appeared before the N.L.R.B.?

Mr. Mitchell: Objected to as immaterial and not within the issues.

Trial Examiner Riemer: Sustained.

Q. (By Mr. Rissman): During the strike of 1945, Mr. Pelton, did you have anything to do with the handling of labor matters for the producers?

A. My regular duties.

(Testimony of Fred E. Pelton.)

Q. And as part of your regular duties, did you advise and consult with the various studios and their personnel?

A. I don't quite understand the question.

Q. Well, did you participate with the executives and officials of the various studios in connection with matters pertaining to the strike?

A. Yes.

Mr. Mitchell: Objected to as being immaterial unless confined to the issues of this case. We are not charged with anything [959] in connection with the strike generally. There are only two charges, paragraphs 16 and 18, that affect the Association.

Trial Examiner Riemer: Overruled.

Mr. Rissman: May the question be read?

(Testimony of Fred E. Pelton.)

Trial Examiner Riemer: The question was answered, I think. Read it.

(The question and answer were read.)

Q. (By Mr. Rissman): Did you issue written instructions to the various studios?

Mr. Mitchell: Objected to as being immaterial, unless confined to the issues in this case.

Trial Examiner Riemer: Overruled.

The Witness: During the strike I issued I don't know how many bulletins pertaining to different matters, dispatching whatever decisions were made by the labor committee. In connection with that particular point I was clearance man, and we dispatched through our office to get everybody advised what the order was.

Trial Examiner Riemer: Go ahead.

Q. (By Mr. Rissman): You say you dispatched a number of them? A. Yes.

Q. Do you know how many you dispatched on about October 31, 1945? [960]

A. No, I don't know the exact number.

Q. What was your method of dispatching them and distributing such bulletins?

Mr. Mitchell: Objected to as being immaterial and outside the issues, unless confined to the charge in the complaint.

Trial Examiner Riemer: Overruled.

The Witness: I would get a telephone call from the chairman of the labor committee to advise the

(Testimony of Fred E. Pelton.)

studios as follows, and he would tell me what to advise them, and then we would phone it around to the different studios.

Q. (By Mr. Rissman): Did you ever issue any written bulletin or notice which was signed by you?

Mr. Mitchell: Objected to as being immaterial unless confined to the issues of this case.

Trial Examiner Riemer: I will sustain the objection, not on that ground, but unless you fix the time, Mr. Rissman, the question is bad in form.

Q. (By Mr. Rissman): During the period of that strike, and in connection with persons who were working or not working during the strike, did you issue any written instructions signed by you?

Mr. Mitchell: Objected to as immaterial unless confined to the issues of this case.

Trial Examiner Riemer: Overruled. [961]

The Witness: As I recall it, there was a message that was dispatched and later which was confirmed by sending out a written memorandum which confirmed what had already been telephoned.

Mr. Rissman: I hand you a document which I will ask the reporter to mark Board's Exhibit No. 12 for identification, and ask you if that is a copy of the dispatch to which you just referred.

(Thereupon, the document referred to was marked as Board's Exhibit No. 12, for identification.)

The Witness: This seems to be a copy. I don't remember the exact wording of these things.

(Testimony of Fred E. Pelton.)

Q. (By Mr. Rissman): Would you have the original in your files? A. I think so.

Q. Do you want to check this to determine if this is correct?

A. I have no interest in it. If you want it checked, it can be done.

Mr. Rissman: Mr. Mitchell, have you checked it with the original?

Mr. Mitchell: I have checked it with the copy that was furnished to me, and the copy which you have is a correct copy. [962]

* * *

Q. (By Mr. Rissman): Do you know to whom you distributed the document or the original or other copies of the document which is marked Board's Exhibit 12, for identification?

Mr. Mitchell: That can be answered yes or no.

Trial Examiner Riemer: Yes, it can be. Do you know?

The Witness: Yes, I do know. I do know, if my orders were carried out, I will have to say. I don't personally mail them.

Q. (By Mr. Rissman): You directed your secretary or some assistant to mail them?

A. That is correct.

Q. And you have no reason to believe that they were not mailed? A. That is right.

Q. Did you send one to Columbia Pictures Corporation? A. I presume so.

Q. To Republic Productions, Inc? A. Yes.

(Testimony of Fred E. Pelton.)

Q. To Warner Bros. Pictures, Inc.?

A. Yes, I think so.

Q. To Loew's Incorporated? A. Yes.

Q. To Twentieth Century-Fox Film Corporation?
A. Yes.

Q. To R.K.O. Radio Pictures, Inc.? [964]

* * *

A. Yes.

Q. What instruction did you give your secretary or whoever mailed this for you with respect to its mailing?

A. To send out the following notice. [965]

* * *

Q. (By Mr. Rissman): When you say "all studios" do you mean all of the members of the Association of Motion Picture Producers? [967]

* * *

Q. (By Mr. Rissman): Did you participate in the determination of the conclusions stated in Board's Exhibit No. 12 for identification?

A. No. I dispatched this as a message. [968]

Q. As a message from whom?

A. Well, as I recall, this was given to me by the chairman of the labor committee at about 4:30 p. m. on October 31, 1945, by telephone.

Q. And the chairman of the labor committee is Mr. Kahane? A. Yes.

Q. He was at that time?

A. I think so. I am not positive, I think it was Kahane. [969]

(Testimony of Fred E. Pelton.)

Q. (By Mr. Rissman): Did you have any conversation with any official of Warner Bros., Loew's, Twentieth Century-Fox, R. K. O., Columbia or Republic, any one or all or any number of those studios, regarding the information you sent out in Board's Exhibit No. 12 for identification?

A. I don't get the question. I tried to follow it carefully. Give me the opening of the question.

Trial Examiner Riemer: Read it back, please.

(The record was read.)

Mr. Mitchell: I object to that unless it is confined to on or about October 31, 1945.

Mr. Rissman: I will confine it to on or about that date.

Trial Examiner Riemer: All right.

The Witness: I don't recall everything that happened during the settlement of the strike, but as I recall, this message was given to me by Mr. Kahane at about this time to tell everybody, and that is all I recall of the detail of the thing.

Q. (By Mr. Rissman): Do you know if you had any inquiries from any of the officials of the studios I have named in the [970] last question?

A. I don't.

Q. As to the application of this additional instruction No. 2 which is Board's Exhibit No. 12 for identification?

A. No, I don't recall whether they asked me what to do or whether they had asked someone else what to do and it got around through the channels to this kind of an order to be dispatched.

(Testimony of Fred E. Pelton.)

Q. Did you have any conversation at or about the time that this instruction was issued with any official representative of the I.A.T.S.E. concerning this matter? A. I don't recall.

Mr. Rissman: That is all I have at the present time.

Trial Examiner Riemer: Mr. Mitchell?

Mr. Mitchell: No questions.

Trial Examiner Riemer: Mr. Luddy?

Mr. Luddy: No questions.

Trial Examiner Riemer: Is Mr. Pelton excused?

Mr. Rissman: I offer Board's Exhibit 12.

Trial Examiner Riemer: Is there any objection, gentlemen, to the document being received in evidence? Apparently not. It may be admitted and marked in evidence as Board's Exhibit No. 12.

(Thereupon, the document heretofore marked Board's Exhibit No. 12, for identification was received in evidence.) [971]

* * *

B. C. "CAPPY" DuVAL

a witness called by and on behalf of the National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. B. C. "Cappy" DuVal.

(Testimony of B. C. "Cappy" DuVal.)

Q. And what is your business or occupation, Mr. DuVal?

A. Business representative of Local 44, I.A. T.S.E.

Q. How long have you been business representative of that local? A. Since 1940.

Q. And you have functioned in that capacity continuously since that time? A. Yes.

Q. Local 44 is which local of the I.A.T.S.E.?

A. Affiliated property craftsmen.

Q. And are the occupations of the members of that local set forth in respondents' Exhibit 2? [974]

A. Yes.

(Testimony of B. C. "Cappy" DuVal.)

Q. Were you business representative of Local 44 during the strike in 1945? A. Yes, sir.

Q. Did you at that time, that is during the strike of 1945, request members of your organization to do the work of employees who were not working in the studios because of the strike? A. Yes.

Q. And was that request to your members pursuant to an agreement between the producers and your organization?

A. It was pursuant to my instructions from international officers.

Q. Which international officers?

A. The president.

Q. Mr. Walsh? A. Right.

Q. And were you advised by Mr. Walsh that the members of your local would be requested to work at jobs which were vacated by persons who

(Testimony of B. C. "Cappy" DuVal.)

were not working because of the strike, pursuant to an agreement between the producers and Mr. Walsh? A. No.

Q. What did he tell you about that?

A. He didn't tell me anything about it. [975]

Q. What did he say with respect to instructing your people to do other work?

A. He sent us a telegram and also a letter which has been put in evidence here and was our instructions as to what our people should do. Also in a meeting he instructed that they were to do everything within their power to keep the studios open, and were to work out of their jurisdiction in any craft that was on strike.

(Testimony of B. C. "Cappy" DuVal.)

Q. Are you referring to the telegram and letter which are in evidence as Respondents' Exhibit 3?

A. Yes, and also the other letter.

Trial Examiner Riemer: That is I.A.T.S.E. Exhibit 1 for identification.

Mr. Rissman: Yes. That isn't here.

Trial Examiner Riemer: Mr. Luddy, I believe, has it.

Q. (By Mr. Rissman): In March 1945 there were some employees who were members of your local, Local 44, who did not want to work at jobs that had been vacated by persons who were not working because of the strike, isn't that so?

A. What was that?

Trial Examiner Riemer: Read the question back, please.

(Testimony of B. C. "Cappy" DuVal.)

(The question was read.)

The Witness: A very small minority, yes.

Q. (By Mr. Rissman): Regardless of the number, there were [976] some?

A. A very small minority, yes. [977]

* * *

Q. What advice, if any, did you give the studios with respect to persons who had refused to follow the instructions of your union in connection with working outside of their own work?

A. I don't just understand what you are trying to get at.

Q. Well, you say there were some people who refused to follow your instructions?

A. That is right.

Q. And to do other work, is that correct?

A. Right.

Q. What advice did you give any of these executives of the studios with respect to whether they should or should not employ those people?

A. I didn't give them any advice that they should not employ anybody.

Q. Prior to May of 1946, did you ever advise any of the [988] studios not to give employment to any of the men named in Board's Exhibit No. 16 for identification? A. I did not.

Q. To your knowledge did anyone for Local 44 ever advise the studios to that effect?

A. Not to my knowledge.

(Testimony of B. C. "Cappy" DuVal.)

Q. If that had been done, you would know about it, wouldn't you? A. Undoubtedly.

Q. It is part of your duties as business agent, isn't it, to keep the studios advised on such matters as to who is or who is not eligible for employment?

A. I have never had an occasion to tell them not to employ anybody, except as to after these people were expelled. That is the first time I ever have advised them not to employ anybody.

Q. That is what I mean. Mr. DuVal, what are the different classifications of membership in Local 44 and what do they indicate or signify?

A. What do you mean by the different classifications?

Q. Well, we have heard testimony in the record of persons being Class A members and Class B members or permit men, and I wish you would explain that.

A. That is related to seniority, and the full seniority clause is written in the contract. I think that will explain [989] it as well or better than I can.

Q. Is it written in Respondents' Exhibit No. 2?

A. Right.

Q. Referring to Respondents' Exhibit No. 2, will you indicate for the record which sections of it cover that subject of the classifications of membership?

A. Section 68, page 21.

Q. This refers to senior group and junior group?

A. That is right.

(Testimony of B. C. "Cappy" DuVal.)

Q. Are those the same as Class A and Class B?

A. Yes.

Q. That is Class A would be the senior group?

A. Class A is the senior, and the junior group would be made up of B, C, D and E, depending on the year that they came in.

Q. Apparently those below the senior group were not spelled out. I wonder if you could tell us about those.

A. All those that were taken in prior to September 27, 1942, were A members. Anybody that was taken in from September 27, 1942 to September 27, 1943 would be B members, and anybody that was taken in from September 27, 1943 to September 27, 1944 would be C members, and so forth.

Q. Is there anything in Respondents' Exhibit No. 2, which is the contract you have in front of you, with respect to permit men? [990]

A. Nothing.

Q. What are permit men?

A. At times we have more work than we have men to cover the jobs, so then we go outside the membership and try to find people who are capable of doing it and issue them a daily permit to fill those jobs until our people are available.

Q. What is your arrangement with the studios with respect to the length of employment of permit men in any particular job classification?

A. They stay there until they are removed by us, until we have people to put in their place or the end of their job, they don't need them anymore because the job is completed.

(Testimony of B. C. "Cappy" DuVal.)

Q. In practice then, are permit men ever kept on when regular members are out of work? [991]

* * *

A. No, I said it was, yes.

Q. What do you mean by that, Mr. DuVal?

A. Well, we have men that work in a lot of job classifications or in a lot of different jobs within a classification that is a trade within itself. They might call for a very fine cabinet maker and we send a permit man over there. We might have a man come on the books who is a sheet metal man or can only work in sheet metal, so it isn't a practice to send a sheet metal man over to take a cabinet man's job because he is not capable of doing it.

Q. Even though the sheet metal man might have a higher classification of membership than the cabinet man?

A. That's right. We are not in the habit of sending people [993] there just to send them who can't do the job.

Q. In those instances where you have men of comparatively equal skills—let's say you have two cabinet makers, one was Class A member, and the other was a permit man. Which one would be given the job?

A. The member, of course. There is no argument there.

Q. And has it been the custom in the industry under the contract for the studios to do just that; namely, if a permit man is working in a job and a

(Testimony of B. C. "Cappy" DuVal.)

regular member man or a regular card holder who is qualified for that work is not working, the permit man would be laid off, wouldn't he?

A. That is not done by contract with the industry. That is done by our own supervision and our own policing.

Q. With respect to Local 44, isn't that part of Respondents' Exhibit 2 that you pointed out, Clause 68?

A. It says nothing in there about permit people.

Q. Well, is there anything in the contract with respect to permit people at all?

A. There is not, because we don't make contract with permit people. We make contracts for members, and the producers are not happy that we send permit people in there even.

Q. Well, alright, let's take the case of members. If you have two cabinet makers, one is a Class A member and one is a Class B member, under the contract is it the obligation of the producer to lay off the Class B member if the Class A [994] member is available for that work and is able to do it?

A. Not just that way, no.

Q. How does it work?

A. If in the reduction of forces there are two cabinet makers there and one is an A man and one is a B man, it is necessary that the B man go first. That is explained in the seniority of the contract. That pertains to the reduction and restoration of forces. [995]

(Testimony of B. C. "Cappy" DuVal.)

Q. (By Mr. Rissman): By restoration of forces, you mean putting people back to work who had been out of work or laid off. Is that right?

A. People—when they want men, they call us, and we take the man that is available on the call book. First we put all the A men to work if he is capable of filling the classification of the call they ask for, and then we take the C men and so forth.

Q. You take the B men after the A men?

A. After the A, then the B, then the C, yes.

Q. Now if there are permit men working and a regular card holder is not working and he is qualified to fill the job, the permit man is taken off the job, is he not?

A. If he is qualified to do the job. If a member is qualified to do the job, yes.

Q. And you do that regularly, don't you—take permit men off to make way for a card holder?

A. Occasionally, not regularly, occasionally. It doesn't [999] happen very much. It did when they first started under the contracts but now they have gotten so they understand the workings. It doesn't happen very much.

Q. When you say they have gotten to understanding the workings, you mean—

A. The man that lays them off and the foremen.

Q. The studio official in charge of those things?

A. Well, I guess you could call him a studio official or you could call him—it happens to be that all of the heads of the prop making and special ef-

(Testimony of B. C. "Cappy" DuVal.)

fects departments are Local 44 men with the exception of two.

Q. And that man knows the practice well enough so that if he has a permit man working and an A card man comes along for the job and it is the same kind of a job that the A card man can fill, this head of the department, whoever he might be, would lay off the permit man and give the A card man the job, wouldn't he?

A. Yes. I think we have got them educated enough to it and they do that now.

Q. Was it the practice last year in October 1945?

A. I wouldn't say that everybody understood the workings of it fully enough that they complied with it even as late as last year.

Q. Well, how long had that been a contract provision or [1000] requirement?

A. It went into the contract in April of 1944.

Q. Was that the first time?

A. That's right. [1001]

Q. And wherever the head of the department wasn't familiar with the practice you would straighten them out on it, wouldn't you?

A. Yes.

Q. And who would have the responsibility in the prop shop and who did have that responsibility in the prop shop at Warner Bros. in November of 1945?

A. Mr. Gibbons.

Q. It has been testified that Mr. Gibbons is a member of your union. Is that right?

(Testimony of B. C. "Cappy" DuVal.)

A. That's right.

Q. Do you know how long he has been a member?

A. I think he came in some time towards the end of 1941 or the beginning of 1942, somewhere along in there.

Q. What was his occupation if you know, when he became a member of your union?

A. The same as it is now.

Q. Is his job covered by Respondents' Exhibit 2, the contract? A. No, it is not.

Q. That job is not listed in the classifications on page seven? A. No, it is not.

Q. So you say you have the heads of these departments as members of your union in all cases except two, is that right? [1002] A. Yes.

Q. Which are the two exceptions?

A. Dave Vail at Columbia and Lew Witty at Twentieth Century-Fox in the special effects—and in the prop making is also Walter Paulman, in the prop making at Twentieth Century. Otherwise in all the special effects and prop making, the heads of the departments are members of Local 44.

Q. What kind of membership do these department heads have in your local?

A. What do you mean?

Q. Is it the same as regular membership?

A. Yes.

Q. Are they eligible to hold office in the local?

A. There is nothing provided in the by-laws that stops them from it.

(Testimony of B. C. "Cappy" DuVal.)

Q. Do you know to what extent they actively participate in the affairs of the union?

A. No, I don't.

Q. As business agent you know who is active.

A. They participate the same as any other member. There is no restrictions on them. Neither is there any extended privileges on them.

Q. To your knowledge how long has Mr. Gibbons been in charge of the prop department at Warner Bros.?

A. Ever since I have been the business agent of Local 44, to [1003] my knowledge, and from hearsay for a long time beyond that.

Q. In other words, as long as you have known him he has been in charge?

A. That is right. [1004]

Cross-Examination

By Mr. Luddy:

Q. Mr. DuVal, I think you referred to this or touched upon the subject in one of the questions and answers on the direct examination. But does the fact that a man is classified, for instance, as a property maker necessarily mean that he is qualified to do any job that somebody else may be doing that is likewise classified as a property maker? [1006]

A. No.

Q. That is to say, are there jobs which come within the classification of property making which other men who are classified as property makers are not qualified to do?

A. Yes.

(Testimony of B. C. "Cappy" DuVal.)

Redirect Examination

By Mr. Rissman:

Q. On this question of your instructions, Mr. DuVal, you said you instructed the men or at least asked the men to do other work. Is that right?

A. Yes.

Q. And your request to them was pursuant to what Mr. Walsh had asked you to convey to them. Is that right? [1007]

A. Yes. [1008]

* * *

Mr. Rissman: Yes, I will do it now, just so we understand that if you do find the other, we may not be precluded from stipulating further.

Mr. Examiner, Mr. Mitchell and I have entered into a stipulation with respect to the testimony of Charles Jensen, one of the employees named in the charge and in the complaint, Jensen having been employed by Warner Bros., and his charge appearing in Case No. 21-C-2564. It is a written stipulation, but for the sake of continuity of the record, I think it might be advisable if I just read it into the record at this point. It is not very long. [1009]

Trial Examiner Riemer: That would be better, I think.

Mr. Rissman: "It is hereby stipulated by and between the undersigned that Charles Jensen if called would testify to the following facts: Charles Jensen was employed by Warner Bros. from sometime in November, 1944, to March 19, 1945. He was

(Testimony of B. C. "Cappy" DuVal.)

employed in the prop department and worked under the immediate supervision of Gus White and Jesse Sapp. James Gibbons was foreman of the prop shop at that time. Jensen is a member of Local 44, I.A.T.S.E. During the strike that started on March 12, 1945, Jensen did not go to work on March 12th or March 13th. He reported for work on March 14th and for the balance of that week performed his regular duties in the prop shop. Jensen was employed on work on miniatures. On March 19, 1945 Jensen attended a meeting in the prop shop which was addressed by Mr. Fuhrmann. On March 19, 1945, Jensen and others were asked by Francis Fuhrmann to go to work in the carpenters' shop. Jensen and others refused to work in the carpenter shop. On March 19, 1945, Jensen was given a blue slip stating that he was being taken off of the payroll because of his refusal to do carpenter work.

"Jensen is now employed at Twentieth Century-Fox Studios and since obtaining this employment in February 1946, he has no desire to be reinstated to his former position at Warner Bros. [1010]

"The foregoing stipulation is made without prejudice to the rights of the undersigned to introduce further evidence with respect to the facts set forth in this stipulation."

It is signed by me as attorney for the Board and by "O'Melveny & Myers and Homer I. Mitchell, attorneys for respondents."

This stipulation is undated but it was signed by

(Testimony of B. C. "Cappy" DuVal.)

me and Mr. Mitchell shortly before September 3, 1946.

Trial Examiner Riemer: What is the reason for the stipulation? Is Jensen unavailable?

Mr. Rissman: Mr. Jensen advised me when I interviewed him sometime in August, 1946, that he was leaving for Europe, on a trip to Europe, and he told me he was leaving about August 26th or 27th which would have been before this hearing was scheduled to open, and that he didn't expect to be back until perhaps around Christmas time.

Trial Examiner Riemer: So stipulated. [1011]

* * *

B. C. "CAPPY" DuVAL

recalled as a witness by and on behalf of the National Labor Relations Board, having been previously duly sworn, resumed the stand, was examined and testified further as follows:

Redirect Examination

(Continued)

By Mr. Rissman:

Q. Mr. DuVal, yesterday afternoon just before (Testimony of B. C. "Cappy" DuVal.)

we closed the hearing, you indicated that you would check the records of your local to determine which of the studios involved in this proceeding had employed permit men on or about the week of October 31, 1945, in jobs covered by Local 44's contract. Have you been able to do that?

(Testimony of B. C. "Cappy" DuVal.)

A. Such records as are kept, yes.

Q. What do your records show for Warner Bros. studio?

A. First let me say that these records are not kept in the regular manner. Sometime just before the end of the strike it was necessary for us to change call stewards. We tried two or three new ones out before we could get one that was satisfactory. One of them had to leave because he could not keep the record properly. At this time we were more concerned about filling calls than we were about keeping accurate records. We used to keep the names of each man each day, [1017] but it seems at this time that they simply put a check mark for a man, and these records do not show whether the man was sent in there to cover the job of sheet metal or pattern making or plumbing or something like that. It just shows that the classification of prop maker was sent in there, just one mark for one prop maker.

Q. Does it show the name of the person who was sent?

A. No, it does not, unfortunately.

Q. It just shows that a prop maker was sent?

(Testimony of B. C. "Cappy" DuVal.)

A. That is right.

Q. What does it show in that respect for Warner Bros.?

A. On the 31st of October, 1949——

Mr. Mitchell: 1949?

The Witness: 1945, I should say, it shows 14 prop makers at Warner Bros.

Q. (By Mr. Rissman): That is permit men?

A. I presume most of them were permit men. They may have sent them one or two card men, but when they started new card men they put down on this list as a job filled. You see we kept track of the jobs filled.

Q. This figure of 14 at Warner Bros. on October 31, what is that, that means that 14 persons were sent there on that day?

A. Yes, that was working there on that day.

Q. Does that figure 14 indicate how many were working [1018] there before October 31?

A. No, that shows the ones that were working there on October 31.

Q. Even though they had been working there before, or it shows they started on October 31?

A. It only shows the ones that were working on October 31, the permit people.

Q. What does it show for the rest of that week?

A. For what?

Q. Is that a daily sheet you have there?

A. Yes. I brought October, November and December with me.

(Testimony of B. C. "Cappy" DuVal.)

Mr. Mitchell: May I ask, does that figure of 14 mean there were, according to your records, 14 prop makers working at Warners or that you sent out 14 new prop makers?

The Witness: That means that there was 14 permit men there that day, and in addition there might have been one or two card men sent. We figure the permit men as one day each. Each day is a new day for a permit man. So there might be a permit man there for a month, and we would keep track of him each day as being a man there for that day.

Q. (By Mr. Rissman): Let's assume a permit man started on October 31, one of those 14.

A. Yes.

Q. Then he would also be on your count for November 1st and November 2nd? [1019]

A. Right.

Q. Assuming that he worked those days.

A. Right.

Q. That is, the fact that he started on October 31 would not mean that he does not appear on the successive days on which he worked? A. No.

Mr. Mitchell: May I ask one other question? The fact that they are on this list of yours for October 31 does not mean that they started on October 31?

The Witness: No, he might have worked before that, and he might have started a year ago.

Q. (By Mr. Rissman): Would you have any permit man on for a full year?

(Testimony of B. C. "Cappy" DuVal.)

A. Yes, we might have.

Q. Is there any time limit as to how long a man remains a permit man before he is given a card?

A. No.

Q. Would that be customary or unusual to have a permit man on as long as a year in the prop maker department?

A. That would not be unusual, no.

Q. How many permit men were at Warner Bros. on November 1st?

Mr. Mitchell: In what classification?

Mr. Rissman: In the prop making classifications of Local 44. [1020]

The Witness: 22.

Trial Examiner Riemer: 22?

The Witness: Yes, 22.

Q. (By Mr. Rissman): Are you taking now only prop makers or are you taking also green men and others?

A. Just prop makers is there. It doesn't say whether they work in the sheet metal shop or in the pattern shop and so forth. We did have a lot of permit men working in the metal shop at that time, in the sheet metal shop.

Q. Do you know how many?

A. I imagine that there was at least 12 or 14.

Q. How many do you have for November 2nd, 1945?

A. 20.

Q. November 3rd?

A. 15.

Q. November 4th?

(Testimony of B. C. "Cappy" DuVal.)

A. It doesn't show November 4th. The next is November 5th. It must have been that the 4th was on a Sunday.

Q. October 31 was Monday, 1945.

A. Was it?

Q. No, that is not correct, Mr. DuVal.

A. There is a day skipped in here, anyway. At least it shows here that the next——

Q. November 4th was Sunday. What do you have for November 5th? [1021] A. 20.

Q. Can you indicate for us the highest number of permit men in the prop making department at Warners during the month of November, so that we won't have to take unnecessary time to cover each day, that is, just glance through your records?

A. This shows that on November 8th there were 29, on November 29 there were 6.

Q. November 29th?

A. No, November 8th was first.

Q. November 8th was 29? A. 29.

Q. And November 9th? A. There were 6.

Mr. Mitchell: The next day?

Q. (By Mr. Rissman): The next day?

A. That is right.

Q. Do you know now of any reason for that drop of so many in one day?

A. No, I couldn't say what the drop was. I mean they might have had an extra large company shooting or might have had a special job that required more men for that one day. [1022]

(Testimony of B. C. "Cappy" DuVal.)

Q. Were the prop makers at Warner Bros., that is, those involved in this case and who had been discharged there on or about March 19, 1945, as card members of your local entitled to jobs over permit men?

A. Certainly. [1035]

* * *

Q. (By Mr. Rissman): Well during the strike did you have any of your members or permit men working at jobs that had been done before the strike by carpenters and painters or electricians or machinists or others who were not working during the strike?

A. Did our members do the work?

Q. Members or permit men?

A. Did the members or permit men do the work of the people who had gone on strike or those respecting the picket line, is that what you mean?

Q. Yes.

A. Yes, certainly, we had lots of them. [1040]

* * *

Q. (By Mr. Rissman): During the strike did you and your [1041] local furnish employees to the studios to work in the various jobs and classifications of persons who were respecting the picket line?

A. We furnished them employees, yes, and some of them, besides working in the job classifications in our contract, did work in the job classifications of

(Testimony of B. C. "Cappy" DuVal.)

people that were striking or respecting the picket line, yes. [1042]

* * *

Q. And was this document, Board's Exhibit No. 17—is this a copy of the Cincinnati Agreement which led to the termination of the strike in 1945?

A. This is the directive that was issued by the American Federation of Labor Council in Cincinnati, yes.

Q. And were you in Cincinnati at the time that was issued? A. No, I was not.

Q. You were here in Hollywood?

A. That is right.

Q. Were representatives of your union in Cincinnati at the time that this was issued?

A. I think President Walsh was there, yes.

Q. And in your official capacity as business agent of Local 44, were you officially advised by President Walsh or other officers of your international with respect to Board's Exhibit No. 17 for identification?

A. Advised that this was the directive?

Q. No, were you advised with respect to this document?

A. Yes, we was told this was what was to take place.

Q. You started to answer a question I asked about the payment [1045] of bonus or extra compensation to employees who worked during the strike. You said it was not exactly the way I

(Testimony of B. C. "Cappy" DuVal.)

stated it in my question, and you were trying to tell us what the fact was when you started to look at Board's Exhibit 8.

A. There was not the bonus or extra compensation.

Q. Explain it as you understand it.

A. Other than this directive——

Q. That is Board's Exhibit 17 for identification.

A. Right. There was an understanding that those that were on strike was to return to work on a certain date, and those that were in there filling the jobs were to stay on the job for a period of 60 days, until this directive could be carried out. Sorrell threatened that he would not come in the studios until those replacements had been taken out.

Trial Examiner Riemer: I am sorry. I don't get that.

Mr. Mitchell: Sorrell.

Trial Examiner Riemer: Sorrell threatened.

The Witness: At that time it was necessary for President Walsh and a representative from the producers to go back to Washington, I think it was, to meet with the Council for a clarification, and they said that they had directed that all employees, both replacements and those that were on strike, were to come in the studios for 60 days. There was a side deal made—— [1046]

Q. (By Mr. Rissman): Between whom?

A. Between Johnston and Hutchinson.

Q. Who is Johnston?

A. Eric Johnston, that is.

(Testimony of B. C. "Cappy" DuVal.)

Q. President of the Association of Motion Picture Producers?

Mr. Mitchell: Wait a minute. Let's not have that kind of a leading question. Maybe Mr. DuVal doesn't know who Mr. Johnston was at that time, and as a matter of fact he was not the president of the Association at that time.

Trial Examiner Riemer: The objection is sustained. Don't lead.

Q. (By Mr. Rissman): Who was Johnston?

A. Eric Johnston at that time was the president or secretary—I forget what you call the Association now, some national Association.

Q. Of what?

A. It escapes me. If you will say it I will tell you whether you are right or not, whether it was the merchants and manufacturers or some board or some different thing.

Q. Could it be the United States Chamber of Commerce? A. Right.

Q. When Eric Johnston made this side deal you are talking about, who was he representing?

A. At that time he was representing the producers, I presume. [1047]

Q. And he made this side deal with Hutchinson?

A. Right.

Q. You refer to William Hutchinson, the international president of the United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor? A. Right.

(Testimony of B. C. "Cappy" DuVal.)

Q. What was the side deal?

A. That they would not work the replacements alongside of the strikers. President Walsh insisted that under the agreement his people would be there for 60 days, so the studio agreed they would have them report to work.

Q. Have who report to work?

A. The replacements, for a period of 60 days, until the directive could be carried out. They took them into the studio and put them around in the studio stages and let them stay there.

Some of our people, it was a little monotonous for them to sit there, so they asked if they could go back to their regular jobs. We consented that they could either go back to their regular job or they could report in each day, as the directive had said. They were to use their own alternative, and some of them went back to their own jobs and some of them stayed and collected their 60 days pay. [1048]

* * *

Q. When you were giving us the last few answers you used the word strikers and replacements. To whom did you refer generally when you used the word strikers?

A. To the members of the Conference of Studio Unions.

Q. That is not only those persons who were members of Local 1421 that called the strike, but also the carpenters and machinists and others who did not go through the picket line, is that correct?

(Testimony of B. C. "Cappy" DuVal.)

A. I didn't say that. I said the Conference of Studio Unions.

Q. I am trying to find out what you mean by your answer. A. I mean just that. [1049]

Q. I don't know, Mr. DuVal, if this record tells us who the Conference of Studio Unions are. What do you understand you mean when you say that?

A. There is the painters and carpenters, 1421.

Q. Set decorators?

A. Right, the publicists, the machinists.

Q. Lodge 1185?

A. Right, I.B.E.W. 40. There is possibly one or two others there.

Q. You referred to their members when you used the word strikers, is that correct?

A. Right. [1050]

* * *

Q. Do you know or were you advised by any of your international officers who represented the producers at the time that the Cincinnati Agreement was arrived at?

A. Who was in Cincinnati representing them at that time?

Q. Representing them at that time, yes.

A. I am told that Eddie Mannix went. Other than that I don't know.

Q. Were you advised by anyone that Mr. Eric Johnston was there, too, representing them?

A. Yes. [1051]

* * *

(Testimony of B. C. "Cappy" DuVal.)

Recross-Examination

By Mr. Mitchell:

Q. Mr. DuVal, on the matter of this 60-day payment, when the Executive Council of the American Federation of Labor issued its directive, one of the features was that the strikers should return to work. A. Right. [1057]

* * *

Q. (By Mr. Mitchell): Now, the strikers were the members of the Conference of Studio Unions, as you have heretofore testified? A. Right.

Q. And Mr. Sorrell was the president of the Conference of Studio Unions? A. Yes.

Q. And he threatened the producers that if they left any replacements furnished by you or furnished by anybody else on the jobs of the strikers he would not quit striking, isn't that true?

Mr. Rissman: Object to the form of the question.

Trial Examiner Riemer: Overruled.

The Witness: That is right.

Q. (By Mr. Mitchell): The I.A.T.S.E. on the other hand contended that the producers had a right to and should continue to employ the replacements on the strikers' jobs, isn't that right?

A. We insisted that they would. [1059]

* * *

Q. (By Mr. Mitchell): Did an impasse arise between the producers and the I.A.T.S.E. and Sor-

(Testimony of B. C. "Cappy" DuVal.)

rell with respect to the [1060] working of replacements following the order of the executive council of the American Federation of Labor?

Mr. Rissman: I object. It calls for a conclusion, if the Examiner please. I have no objection to the witness stating the fact, if he knows what occurred.

Mr. Mitchell: Mr. Examiner, he was here all day——

Trial Examiner Riemer: Overruled.

The Witness: It did.

Q. (By Mr. Mitchell): After that impasse was reached, did anybody do anything about resolving the impasse? A. They did.

Q. Who did what?

A. President Walsh flew from here to Washington to meet with members of the Executive Board of the A. F. of L., to obtain a clarification of the directive.

Q. Who had been representing the producers, for instance?

A. I think that Eddy Mannix and I think Eric Johnston was already there.

Q. Now, were you advised as to what agreement had been reached to resolve this impasse?

A. Yes.

Q. What were you advised the agreement was that resolved that impasse?

A. I was advised that the Executive Council said that the directive meant that the strikers and the replacements [1061] would be there for 60 days, and

(Testimony of B. C. "Cappy" DuVal.)

then there was a deal made between Hutchinson and Johnston that they would not work the replacements and the strikers side by side.

Q. During this 60 days under the Executive Council's directive, the unions were supposed to try to work out their jurisdictional difficulties, and failing that an arbitration committee was to issue its award?

A. That is right. After hearings they were to make a decision which was final and binding. [1062]

Q. During this 60-day interval, while jurisdiction was being determined, it is your understanding that the replacements were to be continued on the payroll?

A. Right.

Q. But were not to work in strikers' work?

A. I didn't understand that they should not do that. I understand that the studio was to have the choice of putting them on the job, and they chose to put the strikers on the job instead of the replacements, and we were pretty much incensed about it at the time. We thought our people had been in there and they were certainly entitled to that, let them take the strikers and put them over on the stage. They hadn't done anything except try to wreck the industry.

Mr. Rissman: I move to strike out the last part of the answer, if the Examiner please.

Mr. Mitchell: I think that is a true statement. I think it should be left in.

Trial Examiner Riemer: Read the answer, please.

(Testimony of B. C. "Cappy" DuVal.)

(The answer was read.)

Trial Examiner Riemer: Strike out the last sentence, "They hadn't done anything except try to wreck the industry."

Q. (By Mr. Mitchell): What the Producers did was to take the replacements off the strikers' work and put the strikers back on it, isn't that right? A. That is right. [1063]

Q. And did Sorrell threaten that if they did not do that he would continue his strike?

A. Right.

* * *

Q. (By Mr. Mitchell): Well, when the Producers took these replacements off the strikers' jobs, what was it your understanding under the agreement made between Mr. Hutchinson [1064] and Mr. Walsh, that was to be done with these replacements?

Mr. Rissman: I object.

Trial Examiner Riemer: Don't answer. Read the question.

(The question was read.)

Trial Examiner Riemer: Overruled.

The Witness: There was no agreement between Hutchinson and Walsh as to what would be done with them.

Q. (By Mr. Mitchell): Who was the agreement between?

A. Between the—in fact, it was part of the direc-

(Testimony of B. C. "Cappy" DuVal.)

tive, of the interpretation, that both parties would remain there and be paid for a period of 60 days until they could determine jurisdiction.

Q. During that 60-day period the Producers did take the replacements off the strikers' jobs, didn't they? A. Yes.

Q. And many of those were paid during that 60-day period without doing any work? A. Right.

Q. Now, you say that some of those replacements went back to work at their regular jobs?

A. Right. [1065]

* * *

Q. Now, you say that there are numerous classifications of work done by men classified under the broad title of prop makers. A. Correct.

Q. One you mentioned as being blacksmith work.

A. Right.

Q. Name all of the various specialites, as you might call them, in the prop makers classification.

A. There is cabinet work, there is pattern making, there [1066] is carpentry, and there is rough carpentering, there is rigging, both ship and general rigging, there is sheet metal work, there is tinsmiths, there is blacksmiths, glaziers, rubber workers, plastic workers, opticians, jewelry, in fact, anything that you can mention, practically any trade you could mention. There is plumbing, there is machinists' work. I venture to say any trade that you could mention is necessary in the making of props.

Q. These prop maker members that you have, are they competent to perform all of those jobs?

(Testimony of B. C. "Cappy" DuVal.)

A. We have——

Q. I mean any one man. [1067]

A. We have people who are proficient in only one and others who might know two or three or three or four or five crafts. I don't think there is any one man that could cover all the crafts.

Q. Well, if there were a permit man employed in, let us say, pattern making specialty, would you require the studio to remove him in order to put on an A card man who was not a skilled patternmaker?

A. No, we would not.

Q. And if a studio has in its employ a permit man doing one of the property making specialties and they need him the next day, what is it the studio's custom to do?

A. The man himself is supposed to call in to the call bureau and tell them he has a call back at the studio the next day.

Q. The studio tells him they want him again tomorrow?

A. That is right.

Q. And then he is supposed to call in?

A. That is right.

Trial Examiner Riemer: If the studio does not tell him that they need the permit man the following day, then what is the customary practice for the permit man?

The Witness: In our constitution, in our contract if they do not tell a man they do not need him the next day, it is the same as a call back. [1068]

Q. (By Mr. Mitchell): If they tell him they don't need him, then what does he do?

(Testimony of B. C. "Cappy" DuVal.)

A. Takes his tool box and goes home.

Q. What is the custom in the studios with respect to the removal of permit men and the replacement of them with card men? Does the studio attend to that or does the union attend to that?

A. The studio, if it is a reduction of forces——

Q. No, no, I don't mean a reduction of forces.

Mr. Rissman: I object to the interruption of the witness merely because Mr. Mitchell doesn't like the answer.

Mr. Mitchell: Oh, I don't understand Mr. Rissman.

Trial Examiner Riemer: Go ahead, Mr. Mitchell.

Mr. Mitchell: Will you have Mr. Rissman stay out of the cross-examination, so that I can proceed?

Mr. Rissman: Would you like to have me leave?

Trial Examiner Riemer: Repeat the question, please.

Mr. Mitchell: I will withdraw the question, and let's start again, and see if we can get somewhere without interruption.

Q. (By Mr. Mitchell): Let us suppose, Mr. DuVal, that a studio has ten permit men doing, let us say, special effects work, and they need ten men to do special effects work the next day, and let's suppose that the union has on its book an unemployed A card special effects man. What is the [1069] customary practice in the industry with respect to the studio employing ten men or the union doing something about it?

(Testimony of B. C. "Cappy" DuVal.)

A. If we have members on the books, we call up the studios that have a like classification of permit men on and tell them that the permit men will have to be terminated and card men taken on in their place.

Q. Is it the custom for the studio to terminate permit men unless they are called by the union and requested so to do?

A. Not unless they are through with the job. Of course, if they are through with the job——

Q. No, I am talking about a job where the studio has ten special effects men and they need ten the next day. Is it the custom for the studio to terminate any of those ten special effects permit men unless the union calls and requests them so to do?

A. No.

Q. Is that the regular practice throughout the industry?

A. That is the regular practice throughout the industry.

Q. That is what you call the union policing the job, isn't it?

A. Right.

Q. Unless the studio happens to know the man personally, is there any way for the studio to know whether a man is a permit man or a card man? [1070]

A. We don't ask them whether we can send a permit man in there. When they call for a person to cover a certain job classification, if we have got a member we send him in and if we don't have a

(Testimony of B. C. "Cappy" DuVal.)

member we send a permit man in. That is our own prerogative, by the studio contracts. It is none of their business whether they are card members or permit men. That is our business, of course.

Mr. Rissman: I move to strike the answer as not responsive and ask the question be read to the witness so the witness can answer.

Trial Examiner Riemen: Denied.

Q. (By Mr. Mitchell): Does the studio have any way of knowing whether a man is a permit man or not? A. No.

Q. Now, with respect to the Local 44 men who were assigned during the strike to do carpenter work, were many of those men permit men?

A. Yes.

Q. Did you furnish numerous permit men to Warner Bros., for instance, to do carpentry work during the strike? A. Yes.

Q. Was it your understanding of the agreement made in Washington by the Executive Council—you mentioned Mr. Hutchinson's name—that those men even if they were permit men were to be continued on the payroll for a period of 60 [1071] days?

A. Right.

Q. And that they need not to work?

A. We insisted that they be kept on the payroll for at least 60 days.

Q. But that they need not work?

A. We did not say that they should not be worked. We would have preferred to have them

(Testimony of B. C. "Cappy" DuVal.)

worked, but the studio had the prerogative of letting which either side they wished to work. [1072]

* * *

Mr. Rissman: I offer Board's Exhibit 17 in evidence.

Mr. Mitchell: Objected to upon the ground it is simply a duplication of Board's Exhibit No. 8, and is therefore just encumbering the record.

Trial Examiner Riemer: What is the difference?

Mr. Rissman: If it is the same as Board's Exhibit No. 8, or part of it, then it won't be necessary to offer it. If the Examiner please, in comparing it I notice that Board's Exhibit No. 8, starting with the No. 1 on the first page and going through No. 5 to the end of the quotation on the second page, is identical with Board's Exhibit 17 for identification. The only difference is that Board's Exhibit 17 for identification is labelled at the top "Cincinnati Agreement, October 25, 1945." If Mr. Mitchell and Mr. Luddy know that to be the date, and will say so, then it won't be necessary to offer Board's Exhibit No. 17. [1078]

Mr. Luddy: October 25.

Mr. Mitchell: That is right, and on the other hand, just because somebody stuck a title on the top of it, it certainly is not and does not purport to be a document of any kind, I am sure.

Mr. Luddy: Board's Exhibit No. 8 is dated December 26, 1945, and refers to the Cincinnati meeting as being October 15 to 24, 1945.

Mr. Rissman: All right, thanks. [1079]

* * *

Trial Examiner Riemer: The hearing will be in order. I note the appearance of counsel.

Mr. Margolis: Yes. I would like to enter my appearance, Mr. Trial Examiner. My name is Ben Margolis, of Katz, Gallagher and Margolis, 111 West Seventh Street, Los Angeles. My firm filed the charges on behalf of the individual charging parties, except in Case No. 21-C-2660.

I have been approached by some, not all of the charging parties to appear here, but have had no word from the others, although they may wish me to appear on their behalf. However, at this time I wish to limit my appearance on behalf of the following charging parties.

I will just give the last name. I think that will be satisfactory.

Sapp, Stoica, White, Mailes, Hentschel, Hand, Lora, Lamb, Ames, Selgrath and Jensen.

Trial Examiner Riemer: That appears to be confined to Case No. 21-C-2564 and 21-C-2664.

Mr. Margolis: I haven't checked that.

Mr. Rissman: 2563 too, Mr. Trial Examiner.

Trial Examiner Riemer: Oh, Ames, yes; 2563.

Mr. Rissman: And 2562 also, Hentschel.

Trial Examiner Riemer: Hentschel. Do you appear for Hentschel? [1086]

Mr. Margolis: Yes. I read that name.

Mr. Rissman: 2562 and 2563.

Trial Examiner Riemer: We welcome your ap-

pearance, Mr. Margolis. All I can say is that I hope your presence here will not create any difficulties or add to the overwhelming burden already suffered by the Trial Examiner.

Mr. Margolis: I hope to be able to accomplish the opposite.

Mr. Mitchell: I asked Mr. Rissman to produce the original charges, and he has done so. I would like to have him stipulate with me as follows:

That in Case No. 21-C-2505, the original charge was filed on April 6th, 1945, by Joseph Cuccia;

That in Case No. 21-C-2562, the original charge was filed by Erwin P. Hentschel on July 6, 1945;

That in Case No. 21-C-2563, the original charge was filed on July 6, 1945, by Katz, Gallagher and Margolis, on behalf of Robert Ames.

Mr. Rissman: In that case also the first amended charge was filed on December 21, 1945;

That a second amended charge was filed on July 1, 1946.

Mr. Mitchell: That on July 6, 1945, the original charge was filed by Katz, Gallagher and Margolis in Case No. 21-C-2564, on behalf of Batchelder, DeSanctis, Gidlund, Hand, Jensen, Lamb, Lora, MacDonald, MacKellar, Simpson, [1087] Stoica, Bonning, White and Sapp;

That the first amended charge was filed on December 13, 1945, at which time the name of J. C. Goudie was added to the charging parties;

That on December 21, 1945, the second amended charge was filed, adding the name Charles J. Larson;

That on July 19, 1946, the third amended charge was filed, adding the names Fred Seward, B. Kenneth Coffey and Willis Howe;

That in Case No. 21-C-2660 the original charge was filed on December 13, 1945, by J. Harold Rogers;

That in Case No. 21-C-2662, the original charge was filed on December 13, 1945, by Katz, Gallagher and Margolis, on behalf of Robert L. Selgrath;

That on December 21, 1945, the first amended charge was filed in that case by Katz, Gallagher and Margolis, adding the name George I. Groth;

That on January 4, 1946, a second amended charge was filed, with respect to the same individual;

That in Case No. 21-C-2664, the original charge was filed on December 21, 1945, by Katz, Gallagher and Margolis on behalf of Eugene V. H. Mailes;

That in Case No. 21-C-2665, the original charge was filed on December 21, 1945, by Katz, Gallagher and Margolis on behalf of Forrest McLoney; [1088]

And that those charges, amended and set forth in the exhibits attached to the Board's amended consolidated complaint, constitute all of the charges filed in this case, namely, those charges as amended being Board's Exhibit No. 5.

Is that so stipulated?

Mr. Rissman: Yes, that is a correct statement of what the records of the Board show.

I may say, with respect to some of those intervening amended charges, which are not attached to the complaint, that sometimes in addition to adding the name of an employee, the name of an employee

is withdrawn, so that there were more names in some of the intervening charges than there were finally.

Mr. Mitchell, you noticed that as you went through?

Trial Examiner Riemer: So stipulated?

Mr. Mitchell: I haven't made any mention of those intervening names by reason of the fact that they aren't involved here and therefore I assumed are not material.

Now I have here a document entitled "Agreement between Producers and I.A.T.S.E. and M.P.M.O. and Local Blank thereof," which I will ask be marked Respondents' Exhibit next in order.

Trial Examiner Riemer: 8. [1089]

(Thereupon, the document above referred to was marked Respondents' Exhibit No. 8 for identification.)

Mr. Mitchell: And that I may say in passing is the typical form of so-called cover sheet which constitutes a part of the various I.A.T.S.E. contracts, and the various parties have copies of it as a part of Respondents' Exhibit No. 2.

I have here a document entitled "Wages scales, hours of employment and working conditions" with respect to I.A.T.S.E. Local No. 727, which I will ask be marked Respondents' Exhibit No. 9.

(Thereupon, the document above referred to was marked as Respondents' Exhibit No. 9 for identification.)

Mr. Mitchell: And I have here a document en-

titled "Wage scales, hours of employment and working conditions" with respect to I.A.T.S.E. Local No. 728 which I ask be marked Respondents' Exhibit No. 10.

Trial Examiner Riemer: Will you just identify for the record the jurisdiction of those locals?

Mr. Mitchell: Yes, Respondents' Exhibit No. 9 is the laborers—the I.A.T.S.E. laborers' contract. The document which I have asked be marked Respondents' Exhibit No. 10 is the lamp operators. When I say contract I mean that these wage scales with a document identical to Respondents' Exhibit 8 attached constitute the contracts of those locals.

(Thereupon, the document referred to was marked Respondents' Exhibit No. 10, for identification.)

Mr. Mitchell: And I will ask that a document entitled "Wage scales, hours of employment and working conditions" with respect to I.A.T.S.E. Local No. 80 which is the grips' local, be marked respondents' Exhibit No. 11, for identification.

(Thereupon, the document referred to was marked Respondents' Exhibit No. 11, for identification.)

Mr. Mitchell: Now without taking the time to identify each of these I am going to ask counsel for the Board to stipulate that witnesses, if called, would testify that on April 17, 1944, each of respondent producers entered into a contract respectively with Local 727, 728, 80, and with the

I.A.T.S.E. itself, which contracts consisted of Respondents' Exhibit 8, and in the case of the laborers, Respondents' Exhibit 9—no, in the case of the lamp operators, of Exhibit 8 and Respondents' Exhibit 10, and in the case of the grips, of Respondents' Exhibit 8 and Respondents' Exhibit No. 11.

Mr. Rissman: You mean April 14, the date it bears?

Mr. Mitchell: No, the documents were actually signed and dated April 17, 1944, and, as you see, are effective as of January 1st, 1944.

Mr. Rissman: I am willing to so stipulate, Mr. Mitchell. [1091] I wonder if you can tell us, however, when these contracts became effective after W.L.B. approval?

Mr. Mitchell: I can't tell you offhand but what happened was they were actually signed on or about April 17, 1944. Their effective date was specified as January 1, 1944. At that time the war was still in progress and Wage Stabilization or War Labor Board approval in the appropriate classifications was required, and those contracts were submitted to the appropriate governmental agency for approval and as the evidence already indicates to some extent, some of them were approved outright, but I don't have the date of that. I can get that for you, however. [1092]

Trial Examiner Riemer: Is the stipulation acceptable, Mr. Rissman?

Mr. Rissman: I have no objection to the identification.

Mr. Mitchell: May we consider that as evidence, or do you want me to call witnesses?

Mr. Rissman: No, you may consider it as evidence as to the date of execution.

Mr. Mitchell: And as to the fact of the execution of the document?

Mr. Rissman: Oh, yes. I am not questioning the document at all.

Trial Examiner Riemer: Then I take it you have no objection to their acceptance in evidence as well?

Mr. Rissman: I have no objection to their acceptance in evidence.

Trial Examiner Riemer: They may be admitted. These various documents which have been previously identified may be admitted and marked in evidence as Respondents' Exhibit 8, Respondents' Exhibit 9, Respondents' Exhibit 10, and Respondents' Exhibit 11.

(The documents heretofore marked Respondents' Exhibits Nos. 8, 9, 10 and 11 for identification were received in evidence.) [1093]

* * *

WILLIAM R. WALSH

a witness called by and on behalf of the respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mitchell:

Q. State your name, please?

A. William R. Walsh.

Q. By whom are you employed?

A. Loew's, Incorporated.

Q. In what capacity?

A. Industrial relations manager, Metro, Goldwyn, Mayer Studios.

Q. Were you employed in that capacity in March, 1945? A. I was.

Q. I will show you Board's Exhibit 10 and ask you if you recall writing that letter?

A. Yes, I did.

Q. Particularly I call your attention to the statement that "your organization has advised us you are not in good standing with it."

A. That's right.

Q. With whom did you have a conversation that was connected with Local 80?

A. Mr. Barrett, the business representative.

Q. Where was that conversation had?

A. By telephone. [1152]

Q. Can you give us the date?

A. No, I can't. I believe it was on the 1st day of November—either the 31st of October or the 1st day of November, 1945.

(Testimony of William R. Walsh.)

Q. Can you give us what was said by Mr. Barrett and yourself in substance?

A. The substance of it was that Mr. Barrett called me and told me that Selgrath was not in good standing with the union and he was not to be returned to work. He had not worked during the strike or he had gone out during the strike at some point.

Q. Are you familiar with the job classification that Selgrath had prior to his leaving the studio?

A. Yes.

Q. What was that job classification?

A. First company grip.

Q. Is that also known as key company grip?

A. Yes, it is sometimes referred to as key company grip.

Q. He referred to it as key grip. Is that the same thing?

A. All the same thing.

Q. After he left, was anybody appointed to take his place?

A. I believe during the strike, after he left, a man by the name of Reed who had been his best boy was appointed to take his place.

Q. Is that Jarl Reed? [1153]

A. I have the name as Carl Reed. Whether it is Jarl or Carl I don't know, but it is the same man.

Q. And when you say he was his best boy, what is meant by "best boy"?

A. That is the assistant to the first company grip.

(Testimony of William R. Walsh.)

Q. He was Selgrath's assistant?

A. It is sometimes referred to as second company grip.

Q. And how long did Mr. Reed continue in that capacity?

A. Well, I believe he continued in that capacity until he resigned in March of this year, 1946.

Q. Did you employ anyone to take his place?

A. No.

Q. Why not?

A. There being no need for the filling of that particular vacancy. [1154]

* * *

Q. Suppose you lay off, say, ten grips and then after four or five days you need ten more grips. How are those obtained?

A. Well, that would depend entirely upon whether they were extra grips or regular grips. Now there is in our organization what is known as the regular crew—those people that have been there for many, many years. Now how they become regular and when I don't know that, but the men know who is regular and who isn't. Your regular crew, you call those back individually. If they are extra grips, you just call the union and say, "Send me ten grips for tomorrow morning." That would obtain in all the crafts whether grips or anybody else. [1155]

* * *

(Testimony of William R. Walsh.)

Cross-Examination

By Mr. Rissman:

Q. Mr. Walsh, you say you are industrial relations manager for Loew's, Incorporated, at the Metro-Goldwyn-Mayer Studios.

A. That's right.

Q. Does that company have any other studios?

A. No, not in this country.

Q. Now when you had this conversation with Bill Barrett, the business agent of Local 80, I.A.T.S.E., did he give you any other names of persons who should not be hired or should not be returned to work? A. No.

Q. Did he submit any evidence to you in writing of [1158] Selgrath's standing in the union?

A. No.

Q. Did you discuss it with Selgrath?

A. No, I don't think I had any conversation with Selgrath from March 23rd down to that date.

Q. Was Selgrath part of your regular crew?

A. Yes. He had been there 15, 16, 17 years, something like that.

Q. How about George Groth? Was he part of your regular crew?

A. Mr. Rissman, I don't know Groth or much about him. I never saw the man. He was just one of the figures that went through this proceeding and I don't know much about him.

Q. Did you have any conversation with any other union representative at about the end of the strike

(Testimony of William R. Walsh.)

with respect to whether you should or should not employ persons who had failed to work during the strike?

Mr. Mitchell: I object to that as being immaterial unless it is confined to Selgrath and Groth, the only men here.

Trial Examiner Riemer: Overruled.

The Witness: I don't have any recollection of any. [1159]

* * *

Q. (By Mr. Rissman): I hand you Board's Exhibit 12, Mr. Walsh, and ask if you ever saw that or a copy or the original of that before. Incidentally, this is in evidence, Mr. Walsh, and you won't have to identify it.

A. I think I received that by telephone from Pelton. Many things were happening that day. I assume that was.

Q. Now, do you know what, if anything, you did with respect to the employees or type of employees mentioned in Board's Exhibit 12?

A. Well, I don't recall having anyone involved in this first situation other than Selgrath and Groth. There may have been others that I don't about. I have no recollection of having done anything about it, as a matter of fact.

Q. Did you advise your various department heads with respect to this instruction contained in Board's Exhibit 12?

A. I presume I did. I have no recollection of it. We [1162] didn't have a great deal of problems so

(Testimony of William R. Walsh.)

I imagine it was confined probably to the construction department. I don't have any immediate recollection of it.

Q. Do you remember what Bill Barrett said to you about Selgrath?

A. Well, now, not specifically except that he was in bad standing with the union.

Q. Did he tell you why? A. Beg pardon?

Q. Did he tell you why?

A. I don't think he told me why. I think we both knew the circumstances surrounding his having refused to work.

Q. What did you know about that?

A. What did I know about it?

Q. Yes.

A. I knew considerable about it, that they had asked him to do carpenter work and he declined to do it. I talked with him about it. This was before March 23rd, I believe. That's the day he left. I talked with him about it and he declined to do carpenter work and he said he would just go home until the strike was over, and that was the last I saw of Mr. Selgrath until—oh, he had been back to work some time before I saw him. I did see him once in the intervening period of time when he appeared before the Industrial Commission on a compensation matter. [1163]

Q. You offered to take him back at that time if he would do carpenter work?

A. Yes, we needed him. He was a carpenter originally.

(Testimony of William R. Walsh.)

Q. What was the basis of your asking Selgrath or people under you asking Selgrath to do carpenter work?

A. Well, he was capable of performing the work and we needed the work done.

Q. You knew that he was a grip, didn't you?

A. Certainly, and we had information from his union that they had asked people from their organization to do any work assigned to them.

Q. What information did you have from the union on that?

A. Just generally that the grips were supposed to do anything that they could do to help us out.

* * *

Q. With how many different locals or unions were you dealing prior to the strike in March of 1945—and when I say “dealing” I mean as being the exclusive bargaining agent of employees in an appropriate unit at Lowe's, Incorporated.

A. Why, I think there are 42, 43 or 44. I don't remember exactly. I may lose one here and there. I have 52 contracts I think.

Q. Local 80 covers what unit as far as your company is concerned?

A. Grips.

Q. What union covers the work of carpenters?

A. 946 prior to the strike.

Q. The United Brotherhood of Carpenters?

A. That's right.

Q. Who was striking at your plant or studio?

A. Well, I think the total got to be about 15

(Testimony of William R. Walsh.)

locals on strike—the Conference group. I don't know as I can name them all.

Q. The strike originally was called by Local 1421, wasn't it? A. That's right.

Q. And then various other unions—carpenters, electricians and others—respected that picket line or didn't go through it, isn't that right? [1165]

A. That is what they told me.

Q. Did you discuss with any representative of Local 946 during that strike your hiring or transferring of people to work into the carpenter shop or in the jobs which were covered by the contract with Local 946? A. During that period of time?

Q. Yes.

A. I haven't any recollection of it. The only time I saw the representatives was when they were on the picket line.

Q. You didn't take much time to discuss anything with them? A. Well, they were busy.

Q. Were you ever given any further advice by Barrett or anyone else connected with Local 80 about Selgrath? A. Yes, I was.

Q. Was that a written communication or telephonic? A. No, telephone.

Q. What were you advised?

A. I imagine it was around the 19th of December which was the day that Selgrath came back to work, they called me and said I could return Selgrath to work as a grip. [1166]

(Testimony of William R. Walsh.)

Q. (By Mr. Margolis): Your first company grips are not assigned to any specific job but all of them as a group do a certain type of work, isn't that so?

A. I don't believe I understand your question, Ben. If you mean are they assigned to a specific cameraman or something like that——

Q. Yes.

A. I think generally they are assigned to a particular cameraman. They become a team.

* * *

Redirect Examination

By Mr. Mitchell:

Q. Mr. Walsh, you were asked about the carpenters respecting the picket lines. Did they also join in the picketing?

A. Oh, yes, they were engaged in picketing.

Q. And did these other Conference of Studio Union groups [1167] also in addition to Local 1421?

A. Oh, yes. [1168]

* * *

GEZA GASPER

a witness called by and on behalf of the respondents being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mitchell:

Q. State your name, please.

A. Geza Gasper, G-a-s-p-e-r, G-e-z-a Gasper.

(Testimony of Geza Gasper.)

Q. By what company are you employed?

A. Columbia Pictures.

Q. What is your capacity there?

A. Prop maker foreman.

Q. Were you acting in that same capacity in March, 1945? A. Yes, sir.

Q. Do you recall an incident on or about March 19, 1945, when your department was engaged in making some arrows? A. Yes.

Q. Where were the shafts of the arrows on that day?

A. They were on a bench in the prop shop.

Q. What was the condition of the shafts at the beginning of the day?

A. Well, they had feathers on; they was new shafts. They was just brought in.

Q. What were they made out of?

A. They was made out of wood, feathered ends.

Q. What was the condition of the wood with respect to being new or treated in any way?

A. Well, they were factory made, varnished, I imagine; whatever it was on there, whatever they put on. They were factory made arrows. Some of them was just plain wood dowel, so that they were both new, and some that they had was old.

Q. You know Irwin Hentschel, do you?

A. Yes.

Q. He was a prop maker in your department?

A. He was.

Q. Was he working under your supervision?

(Testimony of Geza Gasper.)

A. Yes, he was.

Q. Did you have a conversation with him on that date with respect to those shafts?

A. Conversation? I did, yes. I told him that we had to have them toned down a little bit, because they was too bright.

Q. What did you tell him to do?

A. Take some—I had prepared there—I had a little lamp black and water, and told him to take a rag and rub over them to get the sheen off of them.

Q. What did he say?

A. He said that was painting, and I didn't question him any more, because I figured he did not have a paint brush in his hand, so I told him, "if you don't want to do it, why, go in and see Mr. Vail." [1209]

* * *

Q. Well, what system of aging or toning down did you use on these shafts?

A. I used, to the best of my knowledge now, I believe it was water and lamp black.

Q. Who finally did that? [1215]

A. Who finally did it?

Q. Yes. A. Prop makers in the shop.

Q. What did they do?

A. There was several of them doing it.

Q. Did they dip the shafts in it?

A. No, just dip the cloth into the lamp black, and rub it on.

(Testimony of Geza Gasper.)

Q. With a cloth? A. That's right.

Q. Tell us again just what you said to Hentschel, and what he said to you in connection with this thing?

A. Well, I walked up to him and I told him that we had to tone those arrows down, and he walked out with me to where they were and he says, "That's painting." And he says, "I won't do it." Or words to that effect.

I says, "Well, in that case, go in and see Mr. Vail." [1216]

* * *

Q. Was Hentschel the only man who refused to work on these arrows? A. He was. [1217]

* * *

Recross-Examination

By Mr. Rissman:

Q. Was Hentschel a member of the regular crew before the strike? A. He was.

Q. And when you had him standing by on a company, when he came back after the strike, that was regular prop maker work, wasn't it?

A. That's right.

Q. That wasn't any of the work that had formerly been done by the carpenters or painters or others on strike?

A. That was their regular work.

Q. How many men did you have on your regular crew?

Mr. Mitchell: When? I object to it on the ground it is indefinite.

(Testimony of Geza Gasper.)

Trial Examiner Riemer: Sustained.

Q. (By Mr. Rissman): Well, on October 31st or November 1st, whichever day it was that Hentschel came back to work, how many men were on the regular crew?

A. That would be hard to tell. I couldn't tell you. There might have been 10 or 15 men. I don't know.

Q. How many men were on the regular crew before Hentschel was terminated in March, 1945?

A. That would be pretty hard to tell, our crew fluctuates so much. It goes up and down in a matter of days. It is hard to tell how many men you had. [1222]

Q. You said a while ago the regular crew was the men you kept on even though you might not have enough work for them. How many would that be?

A. Approximately 12.

Q. Hentschel was one of those 12, you say?

A. Yes.

Mr. Mitchell: When? I object to it on the ground it is indefinite.

Trial Examiner Riemer: Fix a time, Mr. Rissman.

Q. (By Mr. Rissman): Before the strike?

A. Before the strike he was on our regular crew.

Q. What do you have to do with the requisitioning or calling of prop makers when you need more prop makers? Do you have anything to do with that?

(Testimony of Geza Gasper.)

A. I call the union, and sometimes I call the men themselves.

Q. When do you call the men themselves?

A. When they are men that are available that I might prefer that are members of Local 44.

Q. And when you run out of men you know, or men you want, you call the union, isn't that right?

A. I do.

Q. And you usually know, do you not, which men are regular A card members of the union?

A. I have quite a good knowledge of it, yes, sir.

* * *

Q. Did you have any reason on October 31 or November 1st, 1945 for not giving employment to Irv Hentschel?

A. Well, can you refresh my memory on what day that was? What took place that particular day?

Q. Well, October 31st or November 1st, either one of those days, was the end of the strike, and that is the day when the carpenters and painters and everyone who had been out, started to come back.

A. I had nothing to do with that at all.

Q. As far as you were concerned, is there any reason why Hentschel could not work there as a prop maker?

A. No, I don't.

Q. You don't know of any reason? [1228]

A. No.

* * *

Mr. Mitchell: Mr. Examiner, I am about to call witnesses from Warner Bros. with respect to the

lamp operators. The third amended charge which is attached to the complaint and introduced in evidence in this case does not contain any charge with respect to those lamp operators; namely, Kenneth Coffey, Willis Howe, or Paul Stanley. I have asked counsel to produce the original papers but they are apparently part of another file and are not here and I don't want to have to call these men back again, but I want you to understand I am not waiving the absence of that charge, if there is such an absence in this case. So far, so far as this record is concerned, there is no charge against Warner Bros. with respect to Coffey, Stanley or Howe, and I don't want to, by introducing evidence—I want it understood I am not [1251] waiving the absence of that charge. [1252]

* * *

L. M. COMES

a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Mr. Margolis: May I say something for the record? I do not represent any of the persons covered by this witness' testimony and I intend to leave the hearing room during this portion. I have no objection to the hearing continuing in my absence.

By Mr. Mitchell:

Q. State your name.

A. L. M. Comes.

(Testimony of L. M. Comes.)

Q. By what company are you employed?

A. Warner Bros. Pictures, Incorporated.

Q. In what capacity? A. Chief electrician.

Q. Were you employed as chief electrician during the period between March, 1945 and the present time? A. Yes. [1254]

Q. Do you know a man named Paul L. Stanley?

A. I do.

Q. Was he employed by Warner Bros.

A. Yes.

Q. In what capacity? A. Lamp operator.

Q. Did his employment cease at any time?

A. After the strike was over, yes.

Q. Well, prior to the end of the strike, did he cease appearing for work? A. He did.

Q. About what time?

A. About the last two weeks of the strike. He missed a number of days in between then, but just what they were I don't know.

Q. Prior to the end of the strike, did you have any conversation with him with respect to any dissatisfaction with his conduct? A. I did.

Q. About when was the first occasion?

A. I don't remember.

Q. Can you fix it at all in terms of months? Was it after the strike began? A. Oh, yes.

Q. Can you fix it any nearer than sometime between March 12, [1255] 1945 and two weeks prior to October 31, 1945?

A. I would guess that it was possibly six or

(Testimony of L. M. Comes.)

eight weeks before, or possibly a little more than that, before the end of the strike.

Q. Now, prior to this conversation with him, had you observed anything with respect to his conduct or had anything been reported to you with respect to his conduct? A. Yes.

Q. Which one?

A. Stanley. He was seen taking afternoon calls and it came to my attention that he had come in and taken the call. He would come in on the lot and report for work and punch his card when he wasn't called. I inquired about it with my assistant.

Q. Who did you inquire of?

A. Jack Ohl. I was informed that Stanley had an arrangement, that he was going to school studying, and the arrangement was that he would call in for afternoon calls and when we needed him we would give him a call to help him along. That came to my attention and he was coming in without getting a call and coming in and punching his card and going across the street to the pool hall and spending a few hours and coming in and going down to the sets and fooling around and claiming six hours' work. I told Stanley, I says, "What's this?"

He says, "Well, I had that arrangement with Jack." [1256]

I says, "I asked Jack and he said you were not to come in except when you were called in for work."

I told Stanley, "You know, this can't go on. I

(Testimony of L. M. Comes.)

should fire you, but I'll give you another chance."

He says, he thought Warner Bros. owed him that much.

I said, "Warner Bros. paid you for all the work you put in and a whole lot more you didn't put in, evidently, and they have no obligation to send you to school in the morning, and if I catch you doing any more of this, we are going to have lots of trouble" and he promised he wouldn't do it.

Q. And after that occasion, did you have anything further reported to you with respect to his conduct?

A. After the strike was over, if I remember correctly, he came in and worked a few days and at that time I believe called the office and asked Mr. Amy, one of our office men in there who called the boys on instructions, to punch his card for him, that he was busy and wouldn't be in right away. Amy told him he wouldn't punch a card for him or anybody else.

He said, "You evidently don't know what you are talking about."

Amy said he knew what he was talking about and he wouldn't punch his card or anybody else's card.

Q. Was that reported to you?

A. The following day.

Q. By whom? [1257] A. By Mr. Amy.

Q. And did you say anything to Stanley about that?

(Testimony of L. M. Comes.)

A. I did. I told him he was off our call lists as far as we were concerned.

Mr. Rissman: When was this?

Q. (By Mr. Mitchell): When was this, Mr. Rissman asked.

A. I don't remember the exact date on the thing.

Q. It was after the end of the strike?

A. Yes, I believe about a month, something like that.

Q. When you say he is off of your call list, what do you mean by that?

A. We have a regular list in the studio on what we consider regular employees that work only at Warner Bros., unless we are in a real slack period, and then we report to the local. We call them ourselves, otherwise. If we run out of that list and need more men, we call the local just for additional men, whatever number we may need.

Q. This is lamp operators you are talking about?

A. That's right.

Q. Did you tell Stanley whether or not you would put him on if the union should send him?

A. He was told that if he came in through a local call, it would be all right. It is our practice if we fire a man outright to notify the local that we no longer want him on the lot. [1258]

Q. Did you do that with respect to Stanley?

A. We did not.

Q. When Stanley came in, sent by the local, did you give him a call for the next day, then?

(Testimony of L. M. Comes.)

A. I can't answer that. If we needed the same number of men the next day, we would have, yes.

* * *

Q. Well, after this occasion when it was reported to you that Stanley had asked Amy to punch his time card for him, did you ever again call Stanley directly? A. No.

Q. Now, do you know a man named Kenneth Coffey? [1259] A. I do.

Q. Prior to the strike was he employed by Warner Bros. as a lamp operator? A. He was.

Q. What about Kenneth Coffey's ability?

A. Practically nil.

Q. Why? A. Mostly through drinking.

Q. Well, just tell me about Coffey's drinking.

A. Well, Coffey is an old, old operator. In fact, he worked for me for many long years even before I went with Warner Bros. and since then has worked off and on whenever he is able. He is not what you consider a satisfactory employee at all.

Q. How old a man is he?

A. I would hesitate to guess. He must be—I don't know. He is well along. But he one of those types of fellows that wouldn't get down to where he couldn't navigate and that sort of thing, but through being an old-timer in the business, and everybody felt sorry for him, and as long as he could get around, you would keep him on, sort of feed him the same as you would a sheep dog. He is your dog, the company's dog. So we kept him

(Testimony of L. M. Comes.)

that way. I warned him personally a couple of times about his drinking and had Mr. Ohl go down and see him several times and I told him if [1260] he didn't stop it, we would have to let him go completely.

Q. When was that?

A. That was prior to the strike—off and on over a period of two or three years, I guess, when he really got bad.

Q. Well, was he under the influence of liquor when he was on the job?

A. The man is the type of fellow that drank so much that it would indeed take an expert to tell whether he was drunk or sober.

Q. I didn't ask you whether he was drunk or sober. I asked you if he was under the influence of liquor when he was on the job. [1261]

A. Yes.

Mr. Rissman: Object.

Trial Examiner Riemer: Overruled. Read the question and answer.

(The record was read.)

Mr. Mitchell: Cross-examine.

Cross-Examination

By Mr. Rissman:

Q. Mr. Comes, let's see if we can get this Paul Stanley situation straight. You say that about six or eight weeks, maybe longer, before the end

(Testimony of L. M. Comes.)

of the strike, you had some word that he was punching in for work without having received a call?

A. Right.

Q. Where did you get that information?

A. Through our department, our own office, who issues the calls.

Q. What did they tell you?

A. They told me that Stanley was on the lot, and hadn't been called, and looked and found he had punched his card.

Q. That would be sometime in the summer of 1945? A. I would say so.

Q. Did you fire him?

A. Not at the time, no.

Q. Did you ever fire him?

A. Never fired him insofar as paper is concerned. I simply [1262] told him we weren't going to call him any more.

Q. Well, before the end of the strike you took no action at all except to talk to him?

A. That's right.

Q. And then after the end of the strike Stanley did receive several calls from you, didn't he?

A. I believe so.

Q. And he worked? A. Right.

Q. What did you say is your practice when you fire a man and don't want him back on the lot any more? What do you do?

A. We give him a closeout slip, and write a letter to the Local asking them not to send him to our studio any more.

(Testimony of L. M. Comes.)

Q. You didn't do that with Stanley?

A. No.

Q. You say a closeout slip, are you referring to blue slips called off payroll notices?

A. That's right.

Q. And those are given whenever you fire a man?

A. Outright. [1263]

* * *

Q. And Mr. Mitchell asked you if Coffey was under the influence of liquor when he was on the job, and you said yes. A. Right.

Q. Now, when was the first time you noticed him under the influence of liquor on the job?

A. That I can't remember.

Q. It was so long ago?

A. Right. As I say, he wasn't at the staggering stage, or anything like that, but you could tell very readily that he had been drinking, and I told him on several occasions that he would either have to stop it or I was going to have to dismiss him from the company's services.

Q. When did you tell him that?

A. I don't remember the date.

Q. Approximately?

A. I couldn't tell you, it has been over too long a period of time.

Q. Well, do you recall how long ago you first told him that you would have to dismiss him because he was coming to work under the influence of liquor? A. I don't remember.

(Testimony of L. M. Comes.)

Q. Would it be more than five years ago?

A. No, I don't think so.

Q. What is your best recollection?

A. I really couldn't say. In handling a large number of men, [1265] and only seeing them occasionally, as I do, you don't make any notes or anything of that kind, or pay any particular attention to it. You see different fellows at different times, and have a talk with them and warn them or something like that, and maybe have a check made on them by somebody else, and as long as you get no report on it, you promptly dismiss it from your mind.

Q. And you did go along with Coffey's drinking while he was on the job, and did nothing about it except, as you say, you spoke to him a couple of times?

A. That is right, and had my assistant, Jack Ohl, talk to him and kind of watch him, and asked the boys under whose supervision he was, to watch him and let me know if he didn't behave himself. They all felt sorry for him, and they let him get away with murder. They always gave him a soft job where he didn't have much work to do at all, but still they could claim they needed a man on the set for that work.

Q. And that continued on up until about the time of the strike?

A. Yes.

Q. And then you knew he didn't come through the picket line, didn't you?

(Testimony of L. M. Comes.)

A. He didn't answer his call on the 12th, I believe it was.

Q. 1945?

A. Yes, when the picket line was formed. He had taken a [1266] call the day before for that day, and didn't come in.

Q. When did you decide to let him go?

A. I didn't decide to let him go.

Q. What was your decision?

A. As long as he didn't take the call—our procedure is to make the call, and if he accepts the call for the following day and doesn't show up, or call in, or give us some reason why he didn't show up, we don't call him again. We have too many employees to fool around with the ones that don't come in on their calls. If they call in later on and want to come back to work, maybe the next day or so, why, then we may give them a call, but we don't call them any more after the first day.

Q. But you do take them back if they call in and ask for their jobs?

A. If we need men, occasionally.

Q. And if he didn't come back in the first day, after the first day of the strike, you decided not to give him a call?

A. I didn't decide anything of the kind. There was no decision to make on the thing. That is simply our procedure.

Q. Did Mr. Coffey talk to you at any time about coming back to work?

A. He has not.

(Testimony of L. M. Comes.)

Q. Do you know if he spoke to your assistants?

A. That I wouldn't know. [1267]

Q. Was it reported to you that he called any of your assistants?

A. I heard that he had called in, but I don't remember who even told me at the time.

Q. What did you hear in that respect?

A. That he called in and wanted to know about coming to work, and at that time we had 80 men working, where our regular call list is 225. We needed no more help.

Q. Did you give any instructions to any of your assistants as to whether they should or should not call Coffey?

A. Not that I can recollect.

Q. Did you issue any written notice or instruction of any kind? A. No.

Q. After the strike did you call back any employees whom you knew had failed or refused to cross the picket lines during the strike?

A. Not to my knowledge, unless they had a good reason.

Q. What do you mean by that?

A. Well, possibly some of the men were out of town or something like that, or took off as soon as the strike hit. I am presuming this. I don't remember any particular instances.

Q. I show you Board's Exhibit 12, Mr. Comes, and ask you to read that, please. Did you ever see that before, or one like it? [1268]

(Testimony of L. M. Comes.)

A. Not to my knowledge.

Q. Were you ever advised with respect to the information contained therein?

A. We were told, if I remember correctly, that men who had not been working during the strike period should report to their Local before going back to work, but I don't remember seeing any written instructions of that kind.

Q. Who gave you that oral instruction?

A. I don't remember.

Q. Well, from whom do you normally get your instructions?

A. Well, they either come through the steward of the union, or possibly through the labor relations man in our studio.

Q. By the labor relations man, to whom do you refer? A. Carroll Sachs.

Q. Was Mr. Sachs the head of the labor relations department at Warner Bros. at that time?

A. He was considered as such, yes.

Q. And is that his present position there?

A. I believe so.

Q. Did you ever advise the union that you didn't want Coffey on the lot any more? A. No.

Q. Did you ever discharge him or give him any kind of off payroll notice? A. No. [1269]

* * *

Q. (By Trial Examiner Riemer): Mr. Comes, was Stanley a member of your regular crew?

A. Yes.

(Testimony of L. M. Comes.)

Q. In the case of a man or an employee who was a member of the regular crew, is it necessary for that individual to receive a call each day before reporting for work the following day?

A. Yes, because our crews fluctuate with the requirements of production.

Q. Will you explain that in a little more detail? Just state what the practice is. Let's assume an individual is a lamp operator, and is engaged on Monday with a company. Now, what happens when that lamp operator is through work on that day insofar as his prospective or future employment is concerned?

A. He comes by the office and asks if he has a call for the following day. In the meantime we have made up call sheets for the following day for whatever production may require. It may require more men, or it may require much less, [1270] as they move out of a large set into a small one, and go into process and such things. So they all come by the window.

Q. The time office?

A. Electrical office, and we give them the call for the following day, and check it on our sheets. Now, in Stanley's case, he couldn't very well get a call for the following day unless we knew something was going on in the afternoon when he wasn't going to school. So he would call in and ask if we needed him that afternoon or not, and if we did, the boys would give him a call to report in at 2:00 or 2:30,

(Testimony of L. M. Comes.)

or whatever time they wanted him in, and if we finished our own call sheet, then we would call the Local for any additional men we might want—by number, not by name.

Q. Is it the practice, then, for all members of the regular crew to get a call in order to enable them to report for work the following morning?

A. Right. [1271]

* * *

ROBERT C. AMY

a witness called by and on behalf of the respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mitchell:

Q. State your name, please?

A. Robert C. Amy, A-m-y.

Q. You are employed by Warner Bros.?

A. Yes, sir.

Q. In what capacity?

A. A clerk in the electrical department.

Q. Were you employed in that same capacity during the period of the strike in 1945?

A. Yes. [1286]

* * *

Q. Do you recall an occasion when Stanley had a conversation with you about checking in for him?

A. I sure do.

(Testimony of Robert C. Amy.)

Q. When was that?

A. Well, I would place that around—let's see—about the 4th of November.

Q. 1945? A. 1945.

Q. Where was the conversation had?

A. He called me from—I imagine it was Lane's Pool Room, because one of the boys told me he saw him over there five minutes later, so he couldn't have been very far away, asked me to check him in. I told him I couldn't check him in. Who did he think he was? And he finally hung up on me after I told him I wouldn't check him or anyone else in. Then I started looking around for the cards, and found out that he had come in the day before, and I knew I didn't give him any call. So, I told Mr. Comes about it, because it was taken care of that day. We gave him a six-hour minimum, and let him in the next day, with the intention of letting Mr. Comes handle it, and when he came in the next day, I guess Mr. Comes talked to him.

Q. You fix that date as the 4th of November, was it, after the strike concluded?

A. I would like to correct that. He came out the first day we needed extra men from the local—that was the 27th—so he probably came out on the 28th. He was sent out on a [1288] call from the local, and the 29th was the day I had the conversation with him.

Q. Was this conversation that you had with him before or after the end of the strike?

(Testimony of Robert C. Amy.)

A. That was in November.

Q. You think it was in November?

A. I know it was in November. November 29th, to be exact. [1289]

* * *

Mr. Mitchell: Mr. Examiner, at page 1088 of the transcript in entering into a stipulation with Mr. Rissman yesterday I did so upon the advice that the amended charge of July 19, 1946, contained the names Seward, Coffey and Howe, as charging parties.

Trial Examiner Riemer: What case is this?

Mr. Mitchell: In Case No. 21-C-2564. I asked Mr. Rissman to produce the original charge this morning when I found that there was a possibility that those men were not charging parties. He advised me that the original charge was a part of the file in Case No. 21-C-2735 which is the Machinists' controversy that was dismissed without prejudice.

The reporter has produced that file and it appears that the third amended charge does not contain the names of those persons. I therefore ask that the following language be stricken from the stipulation that I made. I am not charging any wilful misrepresentation, but under an inadvertent misrepresentation of facts; that is, I want the following language stricken: "That on July 19, 1946, the third amended charge was filed, adding the names Fred Seward, B. Kenneth Coffey and Willis Howe."

Now what the fact is can later be proved if there is some different fact, but I want to be relieved from that stipulation entered into inadvertently.

Trial Examiner Riemer: Just that portion?

Mr. Mitchell: Yes. The rest I don't mind, I don't find anything wrong with. I don't ask to be relieved from that.

Trial Examiner Riemer: Well, I think—I don't know whether I can grant the relief requested. Just let me state my understanding that you are not stipulating with respect to the portion you have just now read into the record.

Mr. Mitchell: Very well. Now, when I introduced evidence this morning in defense against the charges filed for Coffey and Howe, I did so, stating that I did not waive the fact that apparently no charge had been filed. I now move that complaint 21-C-2564 be dismissed in respect of the charges or in respect of the portions thereof pertaining to Fred Seward, B. Kenneth Coffey and Willis Howe, upon the ground that those portions of the complaint are not based upon any charge filed by or on behalf of such persons.

Trial Examiner Riemer: What are those names again—Seward, Coffey and Howe?

Mr. Mitchell: That is correct, sir.

Trial Examiner Riemer: What about Stanley?

Mr. Mitchell: Well, I didn't even enter into a stipulation [1293] about Stanley because Stanley was not even claimed to be a party to the charge at that time.

I also move that the complaint as to Stanley be dismissed upon the same ground. [1294]

* * *

Mr. Margolis: Mr. Trial Examiner, I should like to make [1295] a statement that if counsel are not willing to accept the statement as being a correct statement of facts, I should like to be sworn and so testify. That statement is that the third amended charge which Mr. Rissman referred to and which presently appears in one of the National Labor Relations Board files was prepared by me; that is, I directed the girl to prepare the third amended charge and to insert in that third amended charge certain additional names which had not been included in prior charges. Simultaneously with the preparation of that charge I prepared amended charges in one or two other cases, also for the purpose of adding additional names. After preparing those charges I signed them in the presence of a notary and they were sworn to and notarized and then the two or three amended charges were filed by me with the National Labor Relations Board in the same manner as I have always filed charges there, and I understand that the other one or two that I filed at that time did get marked. [1296]

First of all, I should like to know whether that statement of fact on my part will be accepted. If not, I should like to be sworn and be given an opportunity to so testify.

Mr. Mitchell: I can't agree that they were filed because the record shows, so far as revealed to me,

that they were not filed. You may have handed them to the Board, but they never were filed according to the Board's record.

Mr. Margolis: Let me change my statement to say that I handed them to the Board in the same manner that I have handed all of the other charges in this case, which did have the file mark.

Mr. Luddy: Tell us how you handed them to whom you handed them.

Mr. Margolis: My present recollection is that I handed them to Mike Komaroff who was handling the case at that time because I filed a number of charges. It is possible that Mike Komaroff was not in the office at the time and I handed the charges to one of the secretaries there. I couldn't be absolutely certain about that, but I am certain that I either handed them to Mike Komaroff who is a Field Examiner for the National Labor Relations Board, or to one of the Board's secretaries.

Trial Examiner Riemer: All right.

Mr. Luddy: When?

Mr. Margolis: Well, on or about the date that it bears. [1297] I know I swore to it and I am pretty sure I took it in the same day, but it is possible it was the next day.

Mr. Mitchell: I am willing to accept Mr. Margolis' statement as to what he did. I don't want to imply that the document was filed because Mr. Rissman's statement—we are getting so many statements here I don't know what is in evidence and what isn't in evidence. I am willing to accept Mr. Margolis' statement on the assumption that it is conceded

that the document that he handed to the Board does not bear any notation under date filed. Isn't that right?

Mr. Margolis: That is right. It does not bear any notation and my statement of fact does not purport to include any statement that it bears a notation. It is only what I did. I prepared it, swore to it, and submitted it to the Board in the manner I have indicated. [1298]

* * *

FRANCIS E. FUHRMANN

a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mitchell:

Q. State your name, please.

A. Francis E. Fuhrmann.

Q. You are employed by Warner Bros?

A. Yes.

Q. In what capacity?

A. Head of the technical department.

Q. What does the technical department include?

A. It consists of carpenters, grips, painters, machinists, tinnerns, prop makers, laborers, staff men, green men, plumbers, scenic artists, painters.

Q. Were you also head of the technical department in March, 1945? A. Yes, sir.

Q. And have been since that date.

A. I have been since that day.

Q. There has been testimony here, Mr. Fuhr-

(Testimony of Francis E. Fuhrmann.)

mann, as to a [1338] statement you made or are claimed to have made on March 19th, 1945. For example, Mr. Batchelder testified that you told the prop makers at a meeting that if they didn't do carpenter work, "You will not work in the motion picture industry again." That is at page 236.

Mr. White testified at pages 140 and 141 of the transcript in which he said that if the prop makers didn't do carpenter work, "We would never work in the studio again," and various other employees testified to either one or the other or both of those statements.

What did you say to the employees with respect to what would happen if they didn't do carpenter work? [1339]

* * *

The Witness: They asked me if they refused to do carpenter work, what would happen to them. I stated if they refused to do carpenter work, they would be terminated with the studio and would no longer work there. [1339]

Q. (By Mr. Mitchell): Did you say anything about that, that they would no longer work in the industry? A. No, sir.

Q. Did Warner Bros. actually employ some of those men who had refused to do carpenter work?

A. Yes. At the time of the morning crew, there were 38 men issued blue slips and 50 per cent of those or more returned to do work on the 23rd of March, as well as some of the men that did not return until at a later date, that were issued those slips.

(Testimony of Francis E. Fuhrmann.)

Q. Well, even after the end of the strike, did you employ some men who had refused at all times during the strike to work? A. Yes, we did.

Q. To do carpenter work?

A. We employed a Harold Rogers who had refused. We employed a Paul DeSanctis who had refused.

Mr. Margolis: May I have those two names, please?

The Witness: Paul DeSanctis and Harold Rogers and Mr. Donald MacKellar has also been employed.

Q. (By Mr. Mitchell): He was one of those that refused? A. Yes, sir.

Q. Was a man named Horner handed a blue slip?

A. Harold Horner was handed a blue slip. [1340]

Q. Was he re-employed?

A. He was re-employed, also. Mr. George Snell was re-employed, also.

Q. Snell was handed a blue slip?

A. Yes.

Q. Now, Mr. William G. White testified as page 124 that he was foreman in charge of the prop shop on the morning shift. A. Correct.

Q. That was so on and before March 19th?

A. On and before March 19th.

Q. Did you replace him with another man?

A. Yes.

Q. Who?

A. He was replaced with Mr. James Peck.

(Testimony of Francis E. Fuhrmann.)

Q. And did Mr. James Peck continue to be foreman in charge of the morning shift?

A. Yes, he is foreman to this time, at the present date.

Q. When did you replace him?

A. Pardon?

Q. When did you replace Mr. White?

A. Replaced Mr. White on March the 19th, the day he refused to work.

Q. Mr. Sapp testified that he was a prop and miniature gang boss working on the morning shift. Did you replace him? [1341]

A. He was replaced by Mr. Robert Smiley.

Q. When?

A. As of the same date, on March the 23rd when the men started back to work.

Q. And how long did Mr. Robert Smiley continue in the job formerly held by Mr. Sapp?

A. He is still there in that position.

Q. Mr. Stocia testified that he worked on the morning shift in the hardware shop.

A. Correct.

Q. Which was a shop in which he alone worked with some other laborer or some laborer.

A. That is correct.

Q. Did you replace Mr. Stocia?

A. Yes, Mr. Stocia was replaced by Ed. Mailes.

Q. M-a-i-l-e-s? A. Yes.

Q. And when did you replace Mr. Stocia with Mr. Mailes? A. March 23rd.

Q. And how long did Mr. Mailes continue to perform that job?

(Testimony of Francis E. Fuhrmann.)

A. He is still in there at the present time.

Q. Mr. William J. Simpson testified that he was a prop and miniature gang boss. Did you replace him?

A. He was replaced by Mr. Pat Beamer.

Q. When was he replaced? [1342]

A. On that date, March 23rd.

Q. March 23rd? A. Right.

Q. And has Mr. Beamer continued to hold the job formerly held by Mr. Simpson?

A. He is in that present job.

Q. Mr. Carl H. Gidlund testified that he worked as a prop maker in sheet and metal works. Did you replace him?

A. He at the time was working in the sheet and metal works with four other men who did similar work. We have not replaced him. We have had no additional tin work except that the men that are there that are capable of handling it. He was there with Eggenweiler, Jingles, Zaebish, and Robert Bonning. They all worked on the same type of work, and at no time have we had quantities of work where we have employed any additional men in that particular line of work.

Q. Have you either taken on new men or had any men returned for various reasons since October 31, 1945? A. Yes, we have. [1343]

Mr. Mitchell: I have a document here entitled, "Prop Makers Called Between October 31, 1945 and September 14, 1946" with the heading "Called Directly or Returned After Leave of Absence" which

(Testimony of Francis E. Fuhrmann.)

I will ask be marked Respondents' Exhibit next in order.

(Thereupon the document above referred to was marked Respondents' Exhibit No. 13 for identification.)

Mr. Mitchell: And I have another document here entitled, "Prop Makers Called Between October 31, 1945 and September 14, 1946, Called Through Local 44," which I will ask be marked Respondents' Exhibit next in order.

(Thereupon the document above referred to was marked Respondents' Exhibit No. 14 for identification.)

Q. (By Mr. Mitchell): Now, turning to Respondents' Exhibit 13 for identification, the first name is R. Dibb Sr. and under the word "On" it says "11-12-45." What does that mean?

Mr. Rissman: I object to any questions on these documents until they are identified and received in evidence.

Mr. Mitchell: Well, we can't get them in until we get them identified.

Trial Examiner Riemer: Overruled.

Mr. Rissman: I want to know what these are.

Trial Examiner Riemer: Overruled.

Mr. Mitchell: Read the question. [1344]

(The question was read.)

The Witness: Be back on payroll at that date after a sick leave.

(Testimony of Francis E. Fuhrmann.)

Q. (By Mr. Mitchell): What does that "S.L." mean? A. Sick leave.

Q. And it says under "Off": "8-4-45." What does that mean?

A. That is the date he was taken off of the payroll due to sickness and automatically returned after that period of illness.

Q. Is it your custom to automatically return a man after he has been sick?

A. Anyone that has been sick we automatically allow them to come back to work without a call.

Q. Now, the second name on that list is Faggard. After his name are the letters "Vet." What does that mean?

A. He is a veteran, returned from the service.

Q. And under the word "Off," what does that mean—"9-10-46?"

A. He was off at that time for a vacation period from 9-10-46 and back to work 9-30-46.

Q. Have you any records from which you can determine whether that "46" should be "45?"

A. No, I have not.

Q. The next name is H. O. Galley with the letters "L. A." after that. What does that mean?

A. Leave of absence. [1345]

Q. Where it says "Off, 11-19-45," what does that mean, that he went on leave of absence?

A. Off on that date and returned on January 7th, 1946, after a leave of absence. He came back automatically.

Q. Do men given a leave of absence also come

(Testimony of Francis E. Fuhrmann.)

back automatically without a call? A. Yes, sir.

Q. The next name is Mullan.

A. Mullan.

Q. He was on leave of absence?

A. Leave of absence from the 23rd of March, 1945, until the 12th of November, 1945, when he returned to work.

Mr. Rissman: If the Examiner please, may I have a continuing objection to these questions from a document that has not been identified, we know nothing about, and may be Mr. Mitchell's notes, for all we know?

Trial Examiner Riemer: Yes, sir.

Q. (By Mr. Mitchell): The next name is Schnell. What was his job classification? What did he do particularly? A. Pattern maker.

Q. Pattern maker?

A. Pattern maker. He was called in as such.

Q. Are any of the charging parties here capable of doing pattern making work?

A. No, they are not. [1346]

Q. And again these dates "Off" and "On" show when he went off the payroll and when he came on?

A. On and off, when he came back on, as we had pattern work for him to do.

Q. Horner, what does he do?

A. Pattern maker.

Q. And the same is true with him as to being on and off? A. On and off.

Q. Beamer?

A. Beamer was on a sick leave.

(Testimony of Francis E. Fuhrmann.)

Q. He was on a sick leave from 4-26-46 to 8-13-46. Is that it?

A. He started work on 4-26-46 and took his sick leave on 8-13-46. [1347]

Q. And he is still on sick leave or was on September 14th? A. Yes.

Q. Eggenweiler was on sick leave and came on on the dates indicated?

A. He was on and is again off on sick leave.

Q. Pollard was on leave of absence?

A. He was on leave of absence.

Q. Will you explain about these numerous dates on Pollard, please?

A. On Pollard, yes, sir, he was first employed on May the 12th, 1945, and was on leave of absence——

Trial Examiner Riemer: April 12th?

The Witness: April 12th, 1945, I beg your pardon. On September 8, 1945, he was taken off and return again on the 29th of September, 1945. He was then off on 11/30/45, November 30, 1945.

Q. (By Mr. Mitchell): Did he go off on leave of absence or what, then?

A. At that time he went off on a leave of absence, was called back on December 12th on the settlement case with the other boys and was taken off on December 29th. Then he was called back through the local on April the 3rd, 1946.

Mr. Rissman: May I have the last answer read, please?

(The record was read.)

(Testimony of Francis E. Fuhrmann.)

Q. (By Mr. Mitchell): Davis shows "Vac.," what does that mean? [1348]

A. Vacation.

Q. When did he go on his vacation?

A. On November 16, 1945.

Q. He returned when?

A. November 28, 1945.

Q. Hampton shows he is a veteran?

A. Yes, returned November 5, 1945, is working and has worked steadily since.

Q. The same is true of Larson, only the date is 11-7-45? A. Correct

Q. Townsley, when did he go on vacation?

A. On November 3, 1945, returned on November 13, 1945.

Q. Brendel was a veteran who was reinstated on 11-6-45? A. Correct.

Q. Moreland was a veteran, reinstated on January 17, 1946? A. Correct.

Q. Reese?

A. On sick leave from November 24, 1945, returned January 8, 1946.

Q. Rhoades?

A. A veteran returned April 1, 1946.

Q. Baker and L. C. Beamer were both on sick leave and went off and returned on the dates indicated? A. Correct.

Q. What about Cheek? [1349]

A. Cheek is a returned veteran.

Q. Well, when did he return from being a veteran—1-21-46? A. 1-21-46.

(Testimony of Francis E. Fuhrmann.)

Q. And what was period off from 7-8-46 to 8-20-46?

A. That I could not say—leave of absence or time taken off.

Q. What about Hager?

A. Hager was taken off on vacation, off from December 23, 1945, until January 2, 1946.

Q. What was his work?

A. Hager is a pattern maker.

Q. Stafford?

A. Stafford was on vacation from December 22, 1945, until January 3, 1946. [1350]

Q. Now turn to Respondents' Exhibit 14 for identification. The first name it shows Alsdorf off from 3-8-45 and on again 11-12-45. Where was Alsdorf during that period?

A. During that period he had been home sick from the 8th of March, 1945, until November 12th, 1945.

Q. What did Alsdorf do before he was sick?

A. The afternoon man in the hardware room.

Q. And when he got through being sick what did you assign him to doing?

A. He returned in the hardware room on the afternoon shift.

Q. Now there are numerous other names on this list with dates of when they went off and when they were called. Just how did you get those employees?

A. These men were called through the local.

(Testimony of Francis E. Fuhrmann.)

Q. And when you say "called through the local," what do you mean?

A. If we had an increase of work in the prop shop, we would call the local for five additional men or six additional men, whatever was necessary, and they would send us out the men to fill that call.

Q. And were they called on the dates indicated?

A. They were called on the dates indicated.

Q. And were they off again on the dates indicated?

A. They were taken off the payroll on the dates indicated.

Q. Now up to September, 1946, had any prop maker been [1351] reinstated or called since October 31, 1945, except those on Respondents' Exhibit 13 and 14 for identification?

A. No others were called.

Mr. Mitchell: I will offer Respondents' Exhibit 13 and 14 for identification in evidence.

Trial Examiner Riemer: I will reserve ruling on the offer.

Q. (By Mr. Mitchell): Now, these exhibits show the dates but I would like you to tell me when was the first date after October 31, 1945, on which you called any new employee to do work which any of these charging parties are capable of doing.

Mr. Rissman: Will the witness explain what he is looking at?

The Witness: Yes, that is a list showing the dates of the men called from the local that are regu-

(Testimony of Francis E. Fuhrmann.)

lar prop makers which these men here are capable of doing.

Q. (By Mr. Mitchell): And that list you have in pencil was taken——

A. From Respondents' Exhibits 13 and 14.

Q. ——from Respondents' Exhibit 13 and 14?

A. Yes. Williams was the first one, on the 4th day of February, 1946.

Q. Now, just a minute, before you go through that. That means in between October 31, 1945, and February 1, 1946, no [1352] new employee was hired to do work of which these charging parties are capable of doing?

A. Correct.

Q. There are various persons shown on Exhibits 13 and 14 as coming to work prior to that January date, and on Exhibit 13 in many of the instances there are letters "S.L." That means sick leave?

A. Sick leave.

Q. Vacation? A. Vacation.

Q. And veteran? A. Correct.

Q. You recognize an obligation to returned veterans ahead of anybody else?

A. Yes, sir.

Q. And there are a few names on Respondents' Exhibit 13 which don't contain any notation. For instance, Schnell, I think you already said was a pattern maker, and these men can't do pattern making.

A. Correct. [1353]

Q. Horner? A. Pattern maker.

Q. All right. When was the second man called after October 31, 1945, to do work of which these charging parties are capable?

(Testimony of Francis E. Fuhrmann.)

A. Mr. Kidwell, on February the 11th.

Q. The 3rd?

A. The third man, Mr. Sturm, on February the 12th.

Q. The fourth?

A. Mr. Harold Rogers, in February, the 12th.

Q. The fifth—by the way, Harold Rogers is one of these charging parties? A. Correct.

Q. The fifth?

A. Mr. Meehan on February the 20th.

Q. The sixth?

A. Mr. Martinnelli on the 25th of February.

Q. The seventh?

A. Mr. Goodwin, March 7th.

Q. The eighth?

A. Mr. Bruno, March 18th.

Q. The ninth?

A. A Mr. Burr on March the 18th.

Q. The tenth?

A. Mr. Van Kesteren on March 18th. [1354]

Q. Do you have a man named Jingles?

A. Jingles is at the present time on a gang boss rate.

Q. How about Zabish?

A. Zabish is off the rate at the present time. He has been on for a long while.

Q. How about Mullen?

A. Mullen is a gang boss. He is off at the present time and is replaced by Paul Lunceford as a gang boss. He is on a leave of absence.

Q. How long has Jingles been a gang boss?

(Testimony of Francis E. Fuhrmann.)

A. On and off for the past two or three years.

Q. Well, was he during the period of the strike?

A. During the period of the strike he was a gang boss.

Q. Was Zabish a gang boss during the period of the strike? A. Yes, sir.

Q. Was Mullen a gang boss during the period of the strike?

A. He was off during the period of the strike on a leave of absence.

Q. Was he a gang boss prior to his being off?

A. He was gang boss prior to that for a number of years on the night shift. At the termination of the strike he returned as a gang boss on the night shift.

Q. What kind of gang bossing did Mr. Sapp do prior to March 19, 1945?

A. Gang bossing of any miniature or prop work that had to [1355] be done. We had similar gang bosses, depending on the amount of work in the prop shop.

Q. Did he do layout work?

A. He did layout work as all gang bosses do layout work.

Q. After the end of the strike how did you obtain new employees?

A. By calling the local.

Q. For instance, how did you obtain Alsdorf?

A. Called the local.

Q. How did you obtain DeSanctis?

(Testimony of Francis E. Fuhrmann.)

A. Called the local.

Q. How did you obtain Rogers?

A. Through the local.

Q. How did you obtain McKenna?

A. Through the local.

Q. MacKellar, I mean.

A. Through the local.

Q. Did you need any prop makers, any new prop makers, other than those on Respondents' Exhibit 14?

A. No others up to that date, the dates indicated. [1356]

* * *

Q. Since October 31, 1945, how have you hired grips? A. Through the local.

Q. When you say "through the local," what do you do to get grips?

A. Call the local and tell them we need 10 or 20 grips, and whoever they send out we put to work.

Q. Do you ask for them by name?

A. We do not. [1359]

* * *

Cross-Examination

By Mr. Rissman:

Q. Mr. Fuhrmann, in enumerating the various types of employees— A. Yes, sir. [1360]

Q. —in the technical department you used what I understood to be word "staff" men.

A. Plaster Paris staff shop. That is all your

(Testimony of Francis E. Fuhrmann.)

modeling work, the plaster of Paris work comes under the staff shop.

Q. Now, under you, what employees do you have in charge of these various departments?

A. There are foremen and department heads in charge of each group of men.

Q. How many department heads are there and who are they?

A. The department heads would be Mr. Gibbons as head of the prop shop, Mr. Ketcham, head of the grip department, Mr. Robert Green as head of the paint department. All other department heads are termed foremen, as foreman of the machine shop, foreman of the tin shop, foreman of the carpenters, foreman of the plumbers, foreman of the staff shop. There is also one foreman of the special effects and powder department, and one other department head, head of the labor department, also head of the green department and nursery work. [1361]

Q. And do these various department heads and foremen have supervisory employees working under them?

A. Yes, they have.

Q. What is the line of supervision from the department head down?

A. The supervision under department heads are foremen, and then gang bosses.

Q. And what is the line of supervision under these foremen who are in charge of shops—machine shops?

(Testimony of Francis E. Fuhrmann.)

A. Gang bosses under the foremen.

Q. And are all of these gang bosses members of the particular union which bargains for employees in any category?

A. They are all members of unions that they represent excepting the head of the labor department. He has no affiliation. The head of the carpenter shop has no affiliation.

Q. Mr. Gibbons and Mr. Ketcham, however, are members of Local 44?

A. Local 44 and 80.

Q. Respectively? A. Right.

Q. Now on March 19th, 1945, you addressed the employees, did you not? A. Yes, sir.

Q. How many times?

A. I addressed all of the employees of the I.A. crafts and [1362] other jurisdictions that were not on strike, one time in the carpenter shop as a whole, after which I went to the grip department and addressed the grips. I then went into the prop department and addressed the prop makers.

Q. Now, when you addressed the employees at those three different places were you accompanied by any representatives of the International Alliance of Theatrical and Stage Employees?

A. On the first time that I addressed the entire personnel in the technical department there were present Mr. Brewer, Mr. DuVal, Mr. Billingsley and Mr. Barrett.

Q. How did those persons happen to be there at that time?

(Testimony of Francis E. Fuhrmann.)

A. They addressed the entire group on behalf of the I.A.T.S.E. in asking that they do any work that might be asked of them to do by management, after which I addressed the entire group and told them to go back to their respective shops and that in due time I would ask certain crafts to do whatever work I thought necessary to instruct them.

Q. When was the first time you asked any employees under your supervision to do work which had formerly been done by persons who were not working because of the strike?

A. The first group of men that I asked to do such work were the grips. They were addressed on March the 19th at approximately 12:15, along about that time.

Q. What did you ask the grips to do? [1363]

A. I asked the grips to go into the carpenter shop, go on to these stages and erect sets.

Q. Do you recall what you said to them when you made that request?

A. As I recall I told them that I spoke for management and expected them to do whatever work was asked them to do and expected them to do anything that we could to continue production.

Q. When was the next time you asked any group of employees to do the work which had formerly been done by employees who were out because of the strike?

A. I would say that on the same date, approximately a quarter of 1:00 or 1:00 p.m., I asked the

(Testimony of Francis E. Fuhrmann.)

entire morning shift of prop makers to do carpenter work.

Q. Was that meeting held in the prop shop?

A. That meeting was held in the prop shop.

Q. And who was present in addition to you and prop makers?

A. There was just myself and the prop makers, no one else.

Q. Approximately how many prop makers were present at that time?

A. I believe there were 38 men on the morning shift that were present.

Q. And what did they tell you after you asked them to go in the carpenter shop?

A. They refused to go in the carpenter shop.

Q. And after they refused, did you cause the blue slips to be made out to them?

A. After they were told to go in the carpenter shop and they refused to, I told them to go about their work. I then reported to management that the men would not do the carpenter work and was told to terminate their employment.

Q. To whom did you report?

A. To Mr. Sachs.

Q. That's Carroll Sachs? A. Yes.

Q. And is he the one who told you to terminate them? A. Yes, sir.

Q. And did you then cause the blue slips to be made out? A. That is correct. [1365]

(Testimony of Francis E. Fuhrmann.)

Q. (By Mr. Rissman): How did you know that the prop makers wouldn't go to work in the carpenter shop?

A. They told me they would not go in and do the work. [1367]

Q. Who told you?

A. The prop makers.

Q. Any particular ones?

A. No particular one, the group as a whole.

Q. Well, didn't they all talk or did only certain ones talk?

A. *They* I could not say. They refused as a group.

Q. Do you recall any one prop maker who spoke up and said he wouldn't go into the carpenter shop?

A. No. They had no spokesman for them.

Q. Well, you didn't go around and ask each one, did you?

A. No, sir, I addressed them all as a group.

Q. And on the basis of what response they made you reported to Mr. Sachs?

A. To Mr. Sachs.

Q. Thereafter after made out the discharge slips, is that right?

A. Correct. [1368]

* * *

Q. (By Mr. Rissman): What reasons were given to you by the prop makers for their refusal to go into the carpenter shop?

A. The carpenters were their personal friends.

Q. Any other reasons?

A. That is all.

(Testimony of Francis E. Fuhrmann.)

Q. Did any of the prop makers tell you they didn't want to be scabs and strike breakers and that was the reason they didn't want to go into the carpenter shop?

Mr. Luddy: Objected to as immaterial.

Trial Examiner Riemer: Overruled. What is the answer?

The Witness: No, sir.

Q. (By Mr. Rissman): Did any of them tell you that they didn't think it would be fair to take the work of people who were not working because of the strike?

Mr. Luddy: Objected to as immaterial.

Trial Examiner Riemer: Sustained.

Q. (By Mr. Rissman): Well, Mr. Fuhrmann, what is the significance of a blue slip at that meeting?

A. Termination of employment. Whenever work is such that production slacks down, we terminate all employees with a layoff slip which clears them from our payroll and enables them to seek employment at any other studio.

Q. Are blue slips given when you discharge a man?

A. Yes, sir. [1370]

Cross-Examination

(Continued)

* * *

By Mr. Rissman:

* * *

Q. In addition to that type of payment, was there any other extra payment to persons who were

(Testimony of Francis E. Fuhrmann.)

kept on the payroll in the classification in which they worked during the strike?

A. No. There was a 60-day settlement, from the 31st of October to the 29th of December.

Q. What did that involve? Will you explain that?

A. That involved the men that were kept on the payroll after the 31st of October; the prop shop and the machinists.

Q. With respect to the machinists, you said they were kept on the payroll as machinists, but they performed no work as machinists, is that right?

A. Excepting those that might have come from the prop shop that went back into the prop shop.

Q. And the others, what did they do?

A. They just stayed on the lot.

Q. Were there any others in addition to machinists in that status?

A. Yes. We had those that were performing the work of the painters that were on the 60-day settlement.

Q. Were there any others?

A. Just the painters and the——

Q. You have given us painters and machinists so far.

A. And the additional men that worked in the carpenter shop. [1389]

Q. What was the basis of the pay to those people who were involved in what you call the 60-day settlement?

(Testimony of Francis E. Fuhrmann.)

A. I believe it was based on the minimum pay per day for 60 days.

Q. For the particular jobs that they had held?

A. Jobs in which they were working.

Q. Was that a daily or an hourly rate?

A. That was an hourly rate.

Q. Are you able to tell us how many persons in your departments were involved in what you call the 60-day settlement?

A. Approximately 160 men.

Q. That is in addition to the several hundred who received their extra compensation for working outside of their own work, is that correct?

A. Yes, sir.

Q. When did these men, the approximately 160 men involved in this 60-day settlement receive their compensation for that 60-day period?

A. I believe they received it weekly, up to the 29th of December.

Q. They received it during the 60-day period?

A. Yes. [1390]

* * *

Q. During the strike of 1945 you had a lot of men from I.A.T.S.E. locals doing work which was not being done by them before the strike. Isn't that correct? [1401] A. Yes, sir.

Q. And before returning those people to their former jobs or their regular I.A.T.S.E. jobs, did you confer with the business agent of the particular locals involved?

(Testimony of Francis E. Fuhrmann.)

A. No, sir. They went back to their respective shops and were put to work on the work they had done previously.

Q. Now, you testified that on March 19th, 1945, you issued or passed out, either directly or through your subordinates, 38 blue slips. Is that correct?

A. Correct.

Q. Was that to all of the prop makers on the morning shift that day?

A. Yes, sir.

Q. You didn't skip any of them or omit any of them?

A. Not that I know of.

Q. If you did, it was inadvertent?

A. That is right.

Q. And some of those 38 came back to work within a few days after March 19th, didn't they?

A. Correct.

Q. What did you do, rehire them as new employees?

A. No, they had never been taken off payroll.

Q. Well, what was the effect of the blue slip?

A. The effect of the blue slip was to clear them from payroll, but some of them returned to work.

Q. Before the actual bookkeeping was done?

A. Yes, sir.

Q. Did you take back within a few days after March 19th, 1945, any of the prop makers who would not agree or did not agree to work outside of their jurisdiction?

A. Yes, a number of them came to work. Some worked for one day and left. Others have continued to work since.

(Testimony of Francis E. Fuhrmann.)

Q. Well, when they came back after March 19th—what date was that when they did come back?

A. On the 23rd of March.

Q. When they came back on the 23rd, were they all asked to go into the carpenter shop?

A. Yes, sir.

Q. Did they all go in, those that came back?

A. No, this certain group did not go in.

Q. Which group?

A. I believe they were the gentlemen present here, approximately 14 or 15 men.

Q. We know about those. That is why we are here today. But of those who went back to work on March 23rd, did you take any back on that day unless they were willing to go into the carpenter shop on that day? A. No.

Q. And the only way any of them could have gone back to work after March 19th, 1945, was by being willing to go into [1403] the carpenter shop. Is that correct?

A. By being willing to go into the carpenter shop or if we had prop work to do, they would come in as prop makers. [1404]

* * *

Cross-Examination

By Mr. Margolis:

Q. Mr. Fuhrmann, I wonder if you would take a copy of Respondents' Exhibit 13, and have it in front of you.

(Testimony of Francis E. Fuhrmann.)

Do you have that in front of you?

A. That is this one here, I believe? Yes.

Q. Take the first name on there, R. Dibb, Sr.

A. Yes, sir.

Q. There is no on date for him. Does that indicate that Mr. Dibb went to work for the studio sometime prior to the beginning of the strike?

A. Yes.

Q. And worked up to 8-4-45?

A. Correct.

Q. Do you know of your own knowledge that Mr. Dibb was on sick leave during the period from 8-4-45 to 11-12-45?

A. Yes, sir.

Q. Don't you know, as a matter of fact, that Mr. Dibb took a trip to Seattle during that period, and was not sick at all?

A. He was sick on and off during that period. He lost his son during the war, which greatly upset him, and he had been ill on and off. Whether he took a trip during that priod would [1410] be strictly up to him, and have nothing to do with his sick period at all, and being returned to work. He would automatically come to work after that period.

Q. When he came back to work on 11-12-45, did you lay off somebody to give Mr. Dibb his job?

A. No, sir.

Q. Did there happen to be an increase of work just about the time that Mr. Dibb came back?

A. There may have been or there may not have

(Testimony of Francis E. Fuhrmann.)

been. He would still be eligible to come back to work, as are all of our employees, regardless of what department they work in.

Q. In other words, your regular employees are eligible——

Trial Examiner Riemer: Wait a minute. Had you finished your answer, Mr. Fuhrmann?

The Witness: Not quite.

They are all eligible, if they have a leave of absence or sick leave, to come back to work without a direct call from us.

Q. (By Mr. Margolis): Your regular employees are kept on, whether or not there is work for them, is that right? A. No.

Q. Does a man who comes back on sick leave have greater rights to his job than if he had stayed on and not been on sick leave at all?

A. He would, provided he had a great many years of seniority, [1411] and was a very good craftsman.

Q. Then it is your practice that if a man has a number of years of seniority, and is a good craftsman, that he is kept on, regardless of whether there is work for him to do at that particular time or not, is that right?

Trial Examiner Riemer: Don't answer that question.

Mr. Mitchell: I think that is an unfair question, as have been the preceding ones. He is trying to trap the witness.

(Testimony of Francis E. Fuhrmann.)

Trial Examiner Riemer: Never mind, Mr. Mitchell. I don't think it is unfair, but I don't understand, Mr. Margolis, your use of the words "kept on." I wish you would rephrase the question. I don't know whether you mean by "kept on" that he is kept on the payroll without doing any work, or kept in employment.

Mr. Margolis: I think the question is ambiguous in that respect.

Q. (By Mr. Margolis): What I wanted to find out is: Where you have men who have a number of years of seniority, and who are good craftsmen, whether you keep them on the payroll on salary or on compensation even during slacks, when there is not work for them.

A. No, sir. They are laid off, with others, according to seniority and ability of doing work.

Q. When a man is on sick leave and he comes back, he is [1412] taken back whether or not there is work for him, is that right?

A. In most cases there is always work for a man that returns. They don't come back in quantities, and you always have work. You are never that close with your men, that you haven't a place for another man. When we are caught up, others are laid off.

Q. Your force is so flexible that you can almost always add one, two or three men, and find work for all of them?

A. Not if they come back in a great number of

(Testimony of Francis E. Fuhrmann.)

men. If one or two men come back into a department, we could find work. Perhaps it would be for one day or two.

Q. However, in the case of Mr. Dibb, when he came back on November 12, 1945, he continued to work from that point on, is that correct?

A. That is correct, because he is a very good craftsman, and we may have laid off the following day, after he came back, two or three men, if we had been over a man, or had no work.

Q. Do you know if you did?

A. No. I would have to go into the records and find out the number of jobs we were working on at that time.

Q. What kind of work does Mr. Dibb do?

A. Mr. Dibb does prop work, miniature work, stand-by. He is capable of doing any work that a prop maker can work on. [1413]

Q. Is he a pattern maker? A. No, sir.

Q. Was he able to do everything except pattern making?

A. He is not a pattern maker or a furniture builder. He is an all around journeyman and miniature man in the prop shop.

Q. Take the second man, J. Faggard. It shows that he was on, on 4-3-46. I assume the indication that he is a veteran means that he had worked at the studio prior to 4-3-46, prior to being in the Army, and after he was discharged, he came back on 4-3-46. Is that right? A. That's right.

(Testimony of Francis E. Fuhrmann.)

Q. That is what this means. Do you know why he was off from 9-10-46 to 9-30-46?

A. Yes. He was off on a vacation.

Q. Mr. Galley, the next man, has two periods when he was off. Were both of those leaves of absence?

A. Yes, sir.

Q. H. O. Galley. On each of those occasions, when Mr. Galley came back, did you lay off somebody in order to give him his job?

A. We might not have, the day that he came in. We might not have the day after. We might have the previous—I couldn't answer that correctly.

Q. What happened was that you gave Mr. Galley back his job, [1414] and it was necessary to lay somebody off in order to keep Mr. Galley on, and you did so, is that right?

A. Yes, and no. We would not necessarily lay somebody else off to have him return. As I stated before, the men are not coming back in bunches of five or six. They are coming back as an individual man at different times.

Q. I am afraid you did not understand my question. I said, in each of these cases, when Mr. Galley came back, what you did was, you gave him his job back?

A. That's right.

Q. And if it was necessary to lay somebody else off in order to keep him on, you did so, is that right?

A. We would have, yes, if we had lots of work in the shop.

(Testimony of Francis E. Fuhrmann.)

Q. The reason you did that was because Mr. Galley was a man who had been with you for some time, and was a good craftsman, is that right?

A. That's right.

Q. That is your general practice in the studio, is it not?

A. Yes, sir.

Q. Do you know whether or not—I will withdraw that.

Are you familiar with the seniority practices and the consideration of men as A, B, C men, and as permit men?

A. Yes, sir.

Q. What was Mr. Galley during the dates that are shown on Respondents' Exhibit 13? [1415]

A. Mr. Galley, on those dates? I would have to check on the record to see whether he carried an A card or a B card.

Q. As a matter of fact, he was a permit man, isn't that so?

A. I would have to check that. I couldn't say offhand.

Q. You don't know whether he was a permit man or not, is that right?

A. Not unless I checked the records.

Q. I wonder if you would go down Respondents' Exhibit 13—let me ask you this question. We can save some time.

Do you know, with regard to any of the men on Respondents' Exhibit 13, their seniority classification in the sense that we have used that word?

A. On the A, B and C, and otherwise?

(Testimony of Francis E. Fuhrmann.)

Q. And permit.

A. No, I would have to check that back, because there are so many men, whether they are in or out.

Q. You don't know that with regard to any of them?

A. No, sir.

Q. You could obtain that information for both Respondents' Exhibits 13 and 14, could you not?

A. Yes, I could.

Mr. Margolis: I would like to request, Mr. Trial Examiner, that the witness be directed to obtain that information. I do not necessarily want him to return. It could be submitted in writing, as far as I am concerned, but I think [1416] that it is material to the inquiries here, and I would like to have it in the record with regard to each of the persons whose names appear on Respondents' Exhibits 13 and 14, for the dates shown on those exhibits.

Trial Examiner Riemer: Go ahead. I will pass on your request.

Q. (By Mr. Margolis): Mr. Schnell appears on there as, I think, the fifth name. I am talking about Respondents' Exhibit 13.

A. Yes, sir.

Q. Was he one of those who refused to do carpenter work on March 19, 1945?

A. Yes, sir.

Q. And he came back on 9-10-45, and did do carpenter work. Is that right?

A. Correct.

Q. The same is true of Mr. Horner?

A. Correct.

(Testimony of Francis E. Fuhrmann.)

Q. I notice that both Schnell and Horner were off from 10-13-45 to 11-3-45. Could you tell us why that was?

A. That was during the time of a large picket line at the studio, and they did not come through, and they came back on 11-3-45, and both of them went into the pattern shop, to do the pattern work for our camera shop.

Q. Do you know why those two men went off the payroll on [1417] the dates indicated on Respondents' Exhibit 13?

A. They had completed the work that they had been assigned to.

Q. As a matter of fact, they both quit, did they not?

A. Whether they quit or had completed their job, they were off the payroll at that time.

Q. You don't know whether they quit or not?

A. No. They were cleared of payroll on those dates.

Q. I notice that Mr. Beamer, the next name, it is indicated that he was on sick leave. Does that mean that he was off on sick leave prior to 4-26-46 or that he was on sick leave between the period 4-26-46 and 8-13-46.

A. No, he was on sick leave after 8-13-46.

A. Oh. After 8-12-46. He has been on sick leave since that time? Is that right? A. Yes.

Q. Mr. Beamer was hired, then, on 4-26-46 directly without going to the hiring hall, is that right, the Union Hiring Hall?

(Testimony of Francis E. Fuhrmann.)

A. Oh, 4-26-46? I believe at that date he would have come to us through the local. [1418]

* * *

Q. (By Mr. Margolis): It has always been the practice of the studio at which you are employed, has it not, to keep a list of persons who have been employed at one time or another in the prop shop or other departments, and, when you had vacancies, you called upon some of those people directly. Isn't that so?

A. We keep a file or a card record of each man that has worked there, and we have at times called some direct, and mostly called through the union.

Q. This practice of calling some men directly and on the basis that they had previously worked for the studio is a practice that has been in effect all the time that you have been at the studio. Isn't that so?

A. Yes. [1420]

* * *

Q. (By Mr. Margolis): I want to refer back for a moment to Mr. Schnell and Mr. Horner who appear on Respondents' Exhibit 13, I believe the 5th and 6th names there. When they came back to work on September 10, 1945, did they come back as new employees or were they treated as old employees?

A. They came back as new employees.

Q. Is the same thing true of Paul DeSanctis?

A. Paul DeSanctis would come back as new employee.

(Testimony of Francis E. Fuhrmann.)

Q. And that was because they had been given these slips that you handed to them?

A. That's right, they had been laid off.

Q. They had been discharged?

A. That's right. [1425]

* * *

Q. How many men were employed in the prop shop on November 1st, 1945, after the prop men who had been doing work in other jurisdictions came back? A. I would say——

Mr. Mitchell: I object to that on the ground it is indefinite as to whether it means employed and working or simply employed and standing by.

Trial Examiner Riemer: Sustained.

Mr. Margolis: All right.

Q. (By Mr. Margolis): Will you tell me first of all how many men there were in the prop shop at that time—indicated in the last question—employed and working?

A. I would say approximately 55 to 60 men.

Q. And how many men were there in the prop shop at that time on the payroll but not working, just standing by? [1431]

A. That I couldn't say.

Q. Well, I think "standing by" is not the correct phrase. What I mean is not working, not doing anything. A. I couldn't say.

Q. Could you give any approximation?

A. Perhaps 40 to 50.

Q. That is in addition to the 55 or 60 who were

(Testimony of Francis E. Fuhrmann.)

actually working, is that right? A. Correct.

Q. When you testified that there are only 13 men working as prop makers now, did you include the hardware shop or did you exclude it?

A. That was included.

Mr. Margolis: That's all.

Trial Examiner Riemer: Mr. Luddy?

Mr. Luddy: No questions.

Trial Examiner Riemer: Anything else, Mr. Mitchell?

Mr. Mitchell: Yes, there is.

Redirect Examination

By Mr. Mitchell:

Q. Returning to Respondents' Exhibit 13, Mr. Margolis asked you some questions about Lewis L. Beamer? A. Yes, sir.

Q. I notice also there is another Beamer on that list, L. C. Beamer. A. Correct. [1432]

Q. How was Lewis L. Beamer hired?

A. Lewis L. Beamer was hired through the local. There is an error on that from my records here. L. C. Beamer is the person on sick leave who had worked previous to October 31st. He was on sick leave from November 2nd, 1945, and returned on February 4th, 1948.

Q. Then was Lewis L. Beamer on sick leave?

A. No. That is an error in the lists that were made up.

(Testimony of Francis E. Fuhrmann.)

Q. Then does Lewis L. Beamer belong on Respondents' Exhibit 14?

A. Yes, it should. I believe it was on there. I think it is listed in both places. It should be on Exhibit 14.

Q. All right. Now since October 31, 1945, have any employees other than those returning from sick leave or vacations or others than reinstated veterans or other than pattern makers Schnell and Horner been hired by direct calls to the employees?

A. No, sir.

Q. Have all other employees been hired through the union? A. Yes, sir.

Q. These veterans that are listed on Respondents' Exhibit 13, had they all been employed by Warner's prior to their going into the service?

A. Yes, sir.

Q. And left Warner's to go into the service?

A. To go into the service and automatically came back. [1434]

* * *

Q. (By Mr. Mitchell): Will you please explain what your practice was with respect to men who were working for you and any practice you had, if you had one, of laying off those men to make room for somebody else. [1435]

* * *

The Witness: In all the departments of men that have been there for a number of years where they have sickness or sick leave, they automatically

(Testimony of Francis E. Fuhrmann.)

come back and go to work, not necessarily that anyone should lay off that they might come back to work, and it is not the practice of laying off anyone to make room to allow anyone that comes back from sick leave to have a job. We do let anyone with a sick leave or a leave of absence automatically to come back to work.

Q. (By Mr. Mitchell): All right, now, let's forget about the men that were on vacation, on leave of absence or on sick leave. Let's suppose you have 40 prop makers in your employ. A few days before you have laid off two of your men who are your so-called regular men. A. Right.

Q. Would it be your practice to lay off some of your 40 men in order to get back those two so-called regular men who had been laid off?

Mr. Margolis: I object to the question as vague and ambiguous. We wouldn't know whether the rest of the 40 men are [1436] regular men or not. The question doesn't make any sense.

Trial Examiner Riemer: I think I understand it. Do you understand it, Mr. Witness? Do you understand the question?

The Witness: I believe I do.

Trial Examiner Riemer: All right, overruled.

Mr. Mitchell: I think he answered it.

Trial Examiner Riemer: Did you answer it?

The Witness: I said no.

Q. (By Mr. Mitchell): And when a man returns from sick leave, leave of absence, or vacation,

(Testimony of Francis E. Fuhrmann.)

is there any assurance for how long you will continue to employ him? A. No, sir.

* * *

Q. You testified that these men from your prop making department who had crossed jurisdictional lines and done carpenter work during the strike, when returned to your department were held without working there and were paid for a period up to 60 days? A. Correct. [1437]

* * *

Recross-Examination

By Mr. Rissman:

Q. Mr. Fuhrmann, you said that at the end of the strike or about November 1st, 1945, there were 50 to 60 prop makers working and 40 to 50 were not working. Is that right?

A. That's right.

Q. Now those 40 or 50 that were not working, were they actually paid while they were on the payroll?

A. They were paid for a 60-day period there. They were on the payroll to the 29th day of December.

Q. Mr. Margolis in his asking you those questions used the word "standing by" or the phrase "standing by." That is a phrase used in prop making, is it not, in your department? A man stands by with a company. He is actually working, isn't he? That is his job? A. Correct.

(Testimony of Francis E. Fuhrmann.)

Q. You didn't mean to convey the impression that these 40 or 50 men were standing by in that respect? A. No, sir.

Q. They were just standing around, isn't that what you meant? A. Correct. [1439]

* * *

Redirect Examination

By Mr. Mitchell:

Q. Now on this Exhibit 13, on these "on" dates, is that intended to mean that those men are employed for the first time directly on those "on" dates? Look at each one of them. Let's take Faggard.

A. No, he had been employed previously. That does not necessarily show that to be the first time he was employed within the studio.

Q. All right, let's take Eggenweiler. Does that 4-6-45 mean that was the first time he was employed?

A. No, sir. He has been with the studio for years. None of these dates here indicate actual first starting dates.

Q. And is the same thing true with respect to Pollard? A. Yes.

Q. The same thing true with respect to Hampton? [1442] A. Yes.

Q. Larson? A. Yes.

Q. Townsley? A. Yes.

Q. Brendel? A. Correct.

(Testimony of Francis E. Fuhrmann.)

Q. Moreland? A. Yes.

Q. Rhoades? A. Yes.

Q. And Hager? A. Yes.

Q. And do you mean that on those dates under the first word "on" that any of those men were called directly from the union on those dates?

Mr. Margolis: Just a moment. I object to the question as leading and suggestive.

Trial Examiner Riemer: Overruled.

The Witness: These men here on those dates were called directly, coming in on those dates there, those veterans.

Q. (By Mr. Mitchell): Those veterans?

A. Those veterans returning from the service automatically would come in without any call from the union.

Q. Well, now, let's talk about the men on—like Eggenweiler. [1443] Was he called directly on 4-6-45? A. He was called directly.

Q. Where had he been previous to that time?

A. He has been on sick leave.

Q. Previous to that time?

A. Previous to that time.

Q. All right, how about Pollard? How was he called on 4-12-45?

A. To my knowledge he was called directly and he had worked previous to that date.

Q. Where had he been previous to that date?

A. That I would have to check the records on how long he had been off from the previous layoff to that "on" call of April 4th, 1945.

(Testimony of Francis E. Fuhrmann.)

Q. And where it says under Pollard 4-3-46, where had he been previous to that?

A. Previous to that he was on that 60-day settlement, was off on the 29th and on the date of 4-3-46 he was called back through the union on that one date.

Q. Called back through the union on that one date? A. Correct.

Q. Now when you say you called the veterans directly, just describe to me how a veteran returns. Do you call him at all or does he come in or what happens?

A. He would all us that he is available for work, that [1444] he has been discharged, and we would tell him to come back to work.

Q. And that is what you mean by calling these veterans directly that are listed on Exhibit 13?

A. Correct. [1445]

* * *

Trial Examiner Riemer: They may be admitted and marked in evidence as Respondents' Exhibits 13 and 14.

(Thereupon, the documents heretofore marked Respondents' Exhibits Nos. 13 and 14, for identification, were received in evidence.) [1446]

* * *

ROY M. BREWER

a witness called by and on behalf of the intervenor, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Luddy:

Q. What is your name?

A. Roy M. Brewer.

Q. Mr. Brewer, do you hold some official position in the I.A.T.S.E.?

A. International representative.

Q. How long have you been a member of the I.A.T.S.E.?

A. Since 1927.

Q. Have you held some official positions in connection with A.F.L. labor organizations? [1447]

A. Yes. I have been an officer of various A.F.L. organizations for about 15 years.

Q. At one time were you president of some federation in the State of Nebraska?

A. Yes. The Nebraska State Federation of Labor.

Q. That is an A.F.L. organization, is it?

A. It is a state branch of the American Federation of Labor.

Q. When did you become an international representative of the I.A.T.S.E.?

A. On a full time basis on January 1, 1945.

Q. At the present time, where are you assigned?

A. In the Hollywood studios.

Q. How long have you been assigned as an in-

(Testimony of Roy M. Brewer.)

ternational representative to the Hollywood studios? A. Since about March 10, 1945.

Q. Has your assignment kept you continuously on that job ever since down to the present time?

A. It has.

Q. It appears from the testimony already in this record that the 1945 strike started on March 12, 1945. When did you arrive in Hollywood?

A. On noon of that day. That noon, of that day.

Q. Did you immediately become active as an international representative in connection with the strike? A. I did. [1448]

Q. There has been some testimony introduced with respect to a speech which was made by Mr. Walsh of the I.A.T.S.E. at the Women's Club, I think on March 18, 1945. Were you present at that time? A. I was.

Q. Who is Mr. Richard Walsh?

A. He is the international president of the I.A.T.S.E.

Q. And has been for a good many years?

A. Since 1941.

Q. Will you tell us what Mr. Walsh stated in his speech given at the Women's Club on March 18, 1945?

A. Well, he discussed the strike situation, and what its implications were so far as the I.A.T.S.E. was concerned, started out by making the point that the strike was actually a strike against the I.A.T.S.E., and called for the purpose of destroy-

(Testimony of Roy M. Brewer.)

ing the influence and the position of the I.A.T.S.E. in the studios, and described to some extent the historical background of the I.A.T.S.E. in this field.

He pointed out the various jurisdictional strikes that had been called in the industry in which the I.A.T.S.E. had been involved, pointed out that the I.A.T.S.E. had actually organized the industry, and that up until 1919 had enjoyed complete jurisdiction in the studios, and that at that time the Carpenters Union had gone in and taken over some of the jobs that had existed, which created the first open jurisdictional [1449] rift between the two organizations.

He described the situation that existed between 1919 and 1933, during which time there was an open shop in the industry, and went into some detail on the 1933 strike, when the unions went out on strike on an issue of recognition for the sound men, who had been organized between 1930 and 1933 without recognition, and how at that time the Carpenters and Electrical Workers had gone in and taken the jobs of the men who had gone out on strike, so that the membership of the I.A.T.S.E. had dropped from a membership of better than 10,000 to a membership of 165 in less than a year.

He pointed out the similarity between the situation and the dangers that would result to the I.A.T.S.E. if the membership did not respond to the request that he was making for them to keep the studios open.

(Testimony of Roy M. Brewer.)

He pointed out that, behind the issue of the 77 set decorators were the same jurisdictional issues and the same desire on the part of these other unions to take the jurisdiction which the I.A.T.S.E. had enjoyed, and to completely destroy its prestige in the studios.

He also pointed out that keeping the studios in operation was an absolute essential to our position, because if the studios were closed, the groups represented by the Conference would then be in a position to dictate the terms on which they would re-open, and that would mean substantial losses of jurisdiction to the I.A.T.S.E., and in particular to Local 44.

He pointed out the work which Local 44 was doing, and the desirability on the part of particularly the Carpenters to have control over that work, which would mean control over the jobs, and which would mean denial of I.A. men working in these jobs.

He pointed out the elements in the Conference of Studio Unions. He pointed out the absolute impracticability from a trade union standpoint of having set decorators who were essentially stage hands, men who supervised and directed property, men who were essentially a part of the stage crew, having them in a union other than our I.A.T.S.E.

He pointed out that this attempt to invade the actual stage work by the Painters' Union was only one of a series of aggressive acts on their part

(Testimony of Roy M. Brewer.)

which had indicated their desirability of not only taking from us the jurisdiction which we had enjoyed for many years, but they were also setting up a second industrial union in the industry to compete with us, and pointed out the taking in of the office workers into the Painters' Union, the publicity people into the Painters' Union, pointed out how inconsistent that was with sound trade union practices and sound relationships of one A.F.L. union to another.

He wound up by telling them that the studios had to be kept open, if they were not kept open the entire jurisdiction [1451] of the I.A.T.S.E. was in jeopardy, and told them that he was ordering them to do whatever they were required to do in the way of work to keep the studios in operation, that as long as these unions had gone out on strike in violation of their jurisdictional agreements with us in an effort to wrest further jurisdiction from us in violation of those agreements, that they had forfeited any obligation on our part to respect that jurisdiction.

And he said that he was ordering all crafts to cross jurisdictional lines insofar as it was necessary to do so to keep the studios in operation, and that he would expect them to do everything that they were requested to do by way of work except to go into the jurisdiction of those unions that were respecting their contracts and were continuing to work.

(Testimony of Roy M. Brewer.)

As nearly as I can recall that is about what he said. There probably were other things said that I haven't been able to recall, but substantially that was the essence of the meeting. He laid the whole picture before them, pointed out to them the seriousness of it, told them of his order that they must work out of their jurisdiction, told them why. And then there was a period of questions in which he made response to certain questions that were put to him.

Mr. Margolis: Mr. Trial Examiner, I didn't object to the question because I didn't know whether the answer would be material or not. I now move to strike the answer and object [1452] to the question on the ground it is incompetent, irrelevant and immaterial and has no relation to any of the issues in this proceeding.

Trail Examiner Riemer: Overruled. Motion to strike denied.

Q. (By Mr. Luddy): During the course of this questioning period that you referred to, was any question asked him as to whether or not he would put this order of his in writing?

A. Yes, there was.

Q. And what did he say with respect to that?

A. He said he would be glad to do that, and he subsequently did.

Q. At that same time did someone make any statement concerning the possibility of being embarrassed if called upon to do carpenter work?

(Testimony of Roy M. Brewer.)

A. Yes, there were some discussions on that, and there was one man in particular—I think it was Robert Ames, as I recall—who said that he didn't feel that he could go out of his jurisdiction, that he would be embarrassed if he were asked to do that, and as I recall President Walsh told him that after the explanation he had made of the importance of it, if it was going to embarrass him to support the I.A.T.S.E., he thought maybe he should resign, or something like that.

Q. Now, you say that Mr. Walsh stated in response to a question that he would put that order in writing, and I think [1453] you also added that he subsequently did that. A. Yes.

Q. I want to call your attention to a document which I think has heretofore been marked I.A. No. 1 for identification—perhaps I am mistaken—and there are certain other notations on it because it was used in another proceeding, but unless the record shows it has been marked I.A. Exhibit No. 1 for identification——

Trial Examiner Riemer: It has been.

Q. (By Mr. Luddy): I show you I.A. Exhibit No. 1 for identification and ask you if that is the document you had reference to when you say President Walsh subsequently placed that order in writing. A. That's right.

Q. Now, do you know whether or not there was more than one copy of the Defendant's Exhibit I.A. No. 1 for identification made?

(Testimony of Roy M. Brewer.)

A. Yes, here were many copies of it made.

Q. And in what fashion?

A. By photostat.

Q. Do you know what was done with the photostatic copies or some that remained?

A. They were distributed among the various studios and the various groups.

Q. And do you know whether or not any copies of them were [1454] sent to each of the studio locals in Hollywood?

A. There were copies distributed to each of the local unions and to each of the studios as well.

Mr. Luddy: I now ask that Defendant's I.A. Exhibit No. 1 for identification become Defendant's Exhibit No. 1.

Mr. Rissman: You are using the word "defendant" improperly.

Mr. Luddy: I beg your pardon. It was so marked in another proceeding, and it should be I.A. Exhibit No. 1, and perhaps if we can strike out that "defendant's exhibit" that appears thereon—but since it is a photostat I don't know how we can do it.

Trial Examiner Riemer: Is there any objection to this document?

Mr. Rissman: I object to it, if the Examiner please, as being incompetent and immaterial with respect to any of the issues here. It appears from the testimony of the witness that it was distributed among the locals. There is no evidence or indica-

(Testimony of Roy M. Brewer.)

tion that it ever came to the attention of the employees involved in this proceeding.

Mr. Margolis: I want to object generally on the ground it is incompetent, irrelevant and immaterial.

Trial Examiner Riemer: Overruled. It may be received and marked in evidence as I.A. Exhibit No. 1.

(The document above referred to was marked as I.A. Exhibit No. 1 and was received in evidence.) [1455]

Q. (By Mr. Luddy): Mr. Brewer, any notation which appears on the exhibit—apparently “Defendant’s Exhibit 8” and so forth—is something that was placed upon that document after Mr. Walsh had signed it, is it not? A. Yes.

Q. Did you have conferences with all of the business agents of the Hollywood studio locals within a short time after Mr. Walsh had issued the order, I.A. Exhibit 1?

A. We had daily meetings of the business agents at that time.

Mr. Rissman: Pardon me. Do you mean all business agents or just I.A.T.S.E. business agents?

Mr. Luddy: I am referring to the I.A.T.S.E. business agents of the studio locals of the I.A.T.S.E.

The Witness: Yes, we had daily meetings.

Q. (By Mr. Luddy): You understood that, did you not? A. Yes.

Q. And at any such meetings were copies of I.A. Exhibit No. 1 distributed to such business agents? A. They were.

(Testimony of Roy M. Brewer.)

Q. Did you also within a short time after March 19, 1945, have occasion to attend meeting of the different locals of the I.A.T.S.E.?

A. During that period we addressed every local union of the I.A.T.S.E. in Hollywood [1456]

Q. And with particular reference to 728 and 80 and 44, did you address——

A. Each of those, yes.

Q. And at such meetings did you discuss the order which is reflected by I.A. Exhibit No. 1?

A. I did.

Mr. Rissman: I object to that as irrelevant and I also object to the form of the question. I see no necessity for leading the witness.

Trial Examiner Riemer: Overruled.

The Witness: I did.

Q. (By Mr. Luddy): There has been some evidence introduced in your absence with respect to a meeting of some of the prop makers that we held at Warner Bros. studio in the afternoon or early evening of March 19th, I think the day was. Do you recall being there at that meeting?

A. I recall a meeting. I don't recall whether that was the exact date or not, there were so many meetings at that time.

Q. Do you recall a meeting at the early part of the strike at which you addressed a group of the prop makers at Warner Bros. Studio?

A. I do, yes.

Q. Tell us as briefly as you may what you said at that meeting.

(Testimony of Roy M. Brewer.)

A. Well, these men had taken the position that they would not [1457] comply with President Walsh's order to work out of their jurisdiction and——

Mr. Rissman: Just a moment. I object and move to strike the answer, if the Examiner please, as not responsive. The witness was asked to state what was said.

Trial Examiner Riemer: Strike it.

Mr. Luddy: Withdraw the question.

Q. (By Mr. Luddy): What was the occasion for your being present at that meeting?

Mr. Rissman: I object.

Trial Examiner Riemer: Overruled.

The Witness: Well, these prop makers had refused to go in the mill and do the work that was necessary to be done in accordance with President Walsh's order.

Q. (By Mr. Luddy): And had you been so advised? A. I had.

Q. And was that the occasion for your going there? A. It was.

Q. And was that the occasion for your speaking to that group of men? A. It was.

Q. What did you say to them at that meeting?

A. I again reviewed the importance of the situation so far as our retaining jurisdiction was concerned and what the strike meant, and told them that the International was taking a [1458] position that these men had to do this, it was an interna-

(Testimony of Roy M. Brewer.)

tional order, and we would expect every loyal I.A. man to respond and do everything that he could possibly do, and that if he didn't do it, he would be subject to the discipline of the organization.

Q. On March 19th, or thereabouts, of 1945, about how many members of the I.A.T.S.E. were there working in the studios?

Mr. Rissman: I object as immaterial.

Trial Examiner Riemer: Overruled.

The Witness: About something slightly more than 10,000.

Q. (By Mr. Luddy): And do you know what the approximate membership of Local 44; that is, of men working in the studios at that time who were members of Local 44?

A. Approximately 1500.

Q. Of the total amount in excess of approximately 10,000 members of the I.A.T.S.E. who were working in the studios, what was the approximate number of those that refused to comply with the orders of the International President, which is I.A. Exhibit No. 1?

Mr. Rissman: Object:

Trial Examiner Riemer: Overruled.

The Witness: There were only about a hundred who proved disloyal and would not go along with the order and the requirements of the International.

Mr. Margolis: I move to strike the statement "proved [1459] disloyal."

Trial Examiner Riemer: Strike it. That por-

(Testimony of Roy M. Brewer.)

tion of the answer is stricken. What remains is that there were about a hundred.

* * *

Q. (By Mr. Luddy): You are familiar with the doctrine which has been referred to heretofore as the Cincinnati Agreement, are you? A. I am.

Q. For your information, a printed copy of that document has been introduced in evidence and is known in this record as Board's Exhibit 8. Do recall the approximate date when the so-called directive was issued with respect to persons who were out on strike or those who were not working because of the strike should return to work in the studios?

A. The date, I think, was the 25th of October, 1945.

Q. Now, was that an order which was issued by the Executive Council of the American Federation of Labor?

A. It was a directive which was issued by the Council which was accepted by the unions involved.

Q. Now immediately upon that directive being issued, did any dispute or controversy arise as to the meaning of it in any respect? A. Yes.

Q. State what it was.

A. There was a dispute as to what the understanding was, at least the application of the directive was, with respect to the men who were displaced by the returning strikers. The directive stated that all men who were on call on March the 12th should return to the jobs which they had on

(Testimony of Roy M. Brewer.)

March the 12th, and that those who were displaced were to remain in the employ of the producers for the 60 day period during which jurisdictions were being decided.

Q. Now, I think it is probably all in the record, so it won't be suggested that I am leading the witness. It was provided that there would be 30 days during which locally here on the local front they would try to solve the jurisdictional problems. If at the end of 30 days there were any problems unsolved, then there was to be a three-man committee consisting of vice presidents to the A. F. of L. who would sit as a board of arbitrators and attempt to solve the jurisdictional questions which were unsolved locally at the end of that first 30 days.

A. Correct.

Q. So that a total of 60 days it was contemplated would be [1461] consumed.

A. That is correct.

Q. When you refer to a 60 day period, you are referring to a period in which it was anticipated that this machinery would be in operation?

A. That is correct, and the question which was in dispute was whether or not the displaced workers; that is, the workers who were displaced by the strikers returning, were to work or not. Originally the Conference demanded that they be taken off of the lot entirely before they would come on to the lot. President Walsh contended that that was contrary to the agreement and for the moment it

(Testimony of Roy M. Brewer.)

looked like the whole thing would be upset and that the strike might go on. In order to compose the difference of opinion, or to determine the question, a group of people flew back to Washington and reviewed the minutes of the Executive Council of the American Federation of Labor and out of that came a clarification, so to speak, of the agreement which provided that the employer could use his own judgment as to whether the men should or should not work. [1462]

Q. During the 60-day period?

A. During the 60-day period.

Q. Continue.

A. He had the right to use them, if he wanted, and the men did not have to leave the lot, and they did not leave the lot, immediately, at least.

Q. What happened immediately after that with respect to the men who had been filling the jobs that had been vacated by these persons that went out on strike in March?

A. Well, as a matter of fact, the men did not work, at least, in any of the jurisdictions which they had been working in, but some of them—they did remain on the lot, and they did report; they were paid, but apparently in order to compose the situation, there was an off-the-record agreement that these men should not work—at least, they did not work, and they were sitting idle, and it created a rather bad situation on the lots, and so it was agreed that where it was deemed expedient to do so, that they could pay them for their 60-day period

(Testimony of Roy M. Brewer.)

and have them available off the lot rather than on the lot, and that was what was done.

Q. When the strikers went back to work on the 31st, that was some 6 days after the original directive had been issued by the A.F.L., is that right?

A. That is correct; October 31st.

Q. During that period, from the 25th on until the 31st, [1463] the controversy started, and was adjusted in the manner that you have outlined, is that correct?

A. That is correct.

Q. When it appeared that the producers were not going to continue the actual working of the men who had replaced the strikers, did President Walsh make any demands with respect to their receiving compensation for that period of 60 days?

* * *

The Witness: The arrangement for 60 days' employment, or pay in lieu of employment, was a part of the original arrangement, so that, as far as I know, there was never any question about them being paid for the 60 days, after the strikers came back. It was a question of whether or not they should be required to report on the lot every day.

Q. (By Mr. Luddy): There has been some testimony introduced with respect to payments that were made to certain individuals who had worked during the strike, and who had received regular compensation for working in the classification that they were working, and in addition to that, had

(Testimony of Roy M. Brewer.)

received some further money. Are you familiar with that situation? A. I am.

Q. I wish you would tell us what that situation was, and what was done.

A. That was the \$3.50 a day that was referred to. Is that what you are referring to?

Q. Yes. Tell us about that.

A. Well, originally when President Walsh agreed to the settlement, it meant the displacing of large numbers of I.A. members who had been promised by the I.A.T.S.E. that they would be protected in their jobs. In other words, in order to agree to the Cincinnati settlement, President Walsh had to go back to some of the promises that he had made some of these men, and he felt very reluctant to do it, but he was prevailed upon in the interest of the industry, and to reduce the strife, to do it. So, in addition to the agreement that these men were to be employed during the 60-day period, there was also a commitment made to President Walsh that there would be severance pay paid to the workers who were dismissed finally after the jurisdictions were settled.

The terms and amounts of this severance pay was not determined, but there was an overall commitment that some sort of a severance pay arrangement would be worked out for [1465] these workers who were dismissed finally by reason of this settlement.

The way the 60-day payment worked out: By

(Testimony of Roy M. Brewer.)

reason of the refusal of the Conference group to work, most of these men did receive 60 days pay for not working. That was never the intention when the settlement was made. The intention was that they would be given 60 days' work, but because the Conference took the position that they could not work, rather than because the settlement should be upset, President Walsh finally acceded to the position that if they paid them, that would be satisfactory. [1466]

* * *

Q. (By Mr. Luddy): Continue. Tell us now with regard to the matter of the severance pay, unless you have already finished your answer on it.

A. The men who were paid the 60 days' pay were only those men who were actually on the payroll, doing work that was considered out of their previous jurisdiction, on October 31st.

Q. And up to the 29th of December, as I understand it, the 60-day period?

A. But only those who were actually employed in that work on the 31st received this settlement pay, so that anyone who was working on the 29th was not eligible to any such settlement pay.

Q. By the "29th" you mean the 29th of what month?

A. The 29th of October.

Q. All right. Continue.

A. So, the fact was that all of those workers who had done this work and who had been eligible to do it were being displaced from that work with-

(Testimony of Roy M. Brewer.)

out any compensation whatsoever. So, the severance pay arrangement that was made was that those men who had worked in this type of work for a period of 15 days or more, and who would no longer be eligible to work in that work by reason of the settlement, would be given this severance pay of \$3.50 a day for all of the time—the days which they worked out of their jurisdiction during the [1467] strike period.

Q. Prior to the date of the Cincinnati agreement of October 25, 1945, had there been any statement of any kind made to any member of the I.A.T.S.E. that he was going to receive any additional sum for his work as a carpenter in other jurisdictions during the time that he was working during the period of the strike?

Mr. Rissman: Object. Immaterial.

Mr. Luddy: If my purpose is not plain, I would like to state it.

Trial Examiner Riemer: All right. Go ahead.

Mr. Luddy: State it?

Trial Examiner Reimer: Yes.

Mr. Luddy: The suggestion is made apparently, and would be argued, that as a result of certain sums being paid to certain men, it constituted an inducement for those particular men to go through a picket line or to cross a jurisdictional line and do other work. What I want to bring out by this witness is that at the time they were crossing the picket lines, at the time they were crossing juris-

(Testimony of Roy M. Brewer.)

dictional lines, there was no such agreement ever contemplated. They had no reason to believe that——

Trial Examiner Riemer: That is enough.

Go ahead. Don't lead the witness.

Objection overruled. [1468]

* * *

Trial Examiner Riemer: On the record.

Mr. Brewer, as a result of a discussion with counsel, Mr. Luddy is going to ask you some further questions, and we will reserve cross-examination for just a moment.

Q. (By Mr. Luddy): I am not clear, and possibly it is not clearly set forth in the record, just exactly what you meant when you told us the situation with respect to the 60 days, and also told us the situation with respect to the severance pay. I wish to start over. Take your time, and go slowly. Tell us what the arrangement was, and how it was carried out, with regard to the 60-day proposition. Then, when you get through with that, tell us what the arrangement was with regard to the severance pay, and how that was carried out.

Do you understand now what we want?

A. I think so.

Q. Take you time, and give it to us slowly.

A. Well, the 60-day payment—or, the 60-day period was the period which the Cincinnati directive provided for the determination of the jurisdictional questions involved. Thirty days of that were to be used by the committees at the local level trying to compose the differences, and then any

(Testimony of Roy M. Brewer.)

differences that were not composed in the thirty-day period were to be submitted to the three-man committee set up by the executive council, which committee was to make a final and binding determination that would be submitted within the second thirty-day [1470] period, not later than January 1st of 1946.

The 60-day period, leaving the questions of jurisdiction undetermined, there was a question as to which group should do the work involved during those 60 days. So, the agreement was made that all of those men who had been working on any of those jobs on March 12th, or who were on call on March 12th, as it was finally determined, were to go back on those jobs, and that all of the men who might be displaced by that, were to be given other employment for the 60-day period.

The original understanding was that anyone who was not misplaced by reason of some man returning, would continue to work at the job that he was on for the full 60-day period.

After the directive had been issued and the parties returned to Hollywood, the Conference group demanded that all of the I.A.T.S.E. men be taken out of the jurisdictions which they previously enjoyed before the strike was called as a condition of returning to work. This controversy then arose, as to whether the Conference's interpretation was right or whether the I.A.T.S.E.'s interpretation was right.

(Testimony of Roy M. Brewer.)

So, these people went back to work. They reviewed the minutes of the executive council of the American Federation of Labor. They had a conference and the conference resulted in a statement, which was, in effect, that the employer should exercise his usual prerogative as to where he assigned the [1471] work.

Obviously the employer chose to take the I.A.T.S.E. men off of that work, because they were so taken off. And so, instead of those men continuing to work for the 60-day period, as we had contemplated they would, they were actually paid for not working, so that they were required to report for a week or so.

I think it was about November 12th they decided that most of these workers would be paid off in a lump sum, and would not be required to report unless the employer asked for them, which he did not. In no case that I know of did he ask for any of them.

Now, it was also agreed at Cincinnati that, in addition to their being carried for 60 days, after the jurisdictions were determined, there would be a severance pay allowed for those workers who were permanently displaced from the jurisdictions as a result of the settlement.

Q. Continue.

A. So as a result of the position of the Conference, all of the men who were employed on October 31st got 60 days severance pay because they

(Testimony of Roy M. Brewer.)

were not required to work for it, so actually the guarantee of employment for 60 days as a result of the application of the thing became a 60-day severance. But, there was this large group of workers who happened to not be working on the 31st.

Q. Just a moment. Right at that point: On the 31st, you just told us there was a large group of workers who happened not to be working. Happened not to be what? Working on that day?

A. Who were not working in the jurisdiction of the unions which had sent their people back to work.

Q. Were there persons in that group who, during the course of the strike, had been working in jurisdictions which previously had been taken by the carpenters or other members of the Conference of Studio Unions?

A. Yes. There were substantial numbers of them.

Q. When you refer, as you just have, to a large group of persons who were not working on the 31st, do you refer to persons who, although not on the 31st, had at some time or other during the course of the strike been working in the jurisdictions which, prior to the strike, had been under the Conference of Studio Unions? A. Yes.

Q. Continue from there.

A. These men who had been doing that work, some of them a few days, some of them most of their time, were frozen out of this field of employ-

(Testimony of Roy M. Brewer.)

ment by reason of this settlement, without any severance pay or any compensation for the loss or potential loss of employment.

Therefore, it was subsequently agreed that the severance [1473] pay which the producers had agreed to pay in Cincinnati would be applied to a payment for each of those workers who had worked some time during this period in the jurisdiction of these unions that had gone on strike for 15 days or more, a payment equivalent to \$3.50 a day, and we considered that was compensation for their loss of employment in that area, which they had been more or less promised when they were asked to go in there and do that work.

Q. When you say they had been promised, you are referring to the promise that you referred to in your testimony, namely, that the I.A.T.S.E. would endeavor to see that the job they got was permanent?

A. Correct. [1474]

* * *

Q. And in some instances those men, having worked for 15 days or more in another jurisdiction during the course of the strike, received pay for having so worked?

A. No. No man got paid on the \$3.50 a day settlement who got the 60-day payment. No man got both of them [1475]

* * *

(Testimony of Roy M. Brewer.)

Cross-Examination

By Mr. Rissman:

Q. While we are on that \$3.50 per day pay, that pay was received by persons who ceased working in the studios after the strike, as well as by those who continued to work in the studios after the strike, was it not? A. That's right.

Q. So, to get back: During the strike, the I.A.T.S.E. undertook to furnish men to do the work of people who were out because of the strike, such as painters and carpenters and others, is that correct? A. That is correct.

Q. In the machine shop, and all of the others?

A. That is correct.

Q. Some of those people that you furnished to do the work of those who were out because of the strike came from I.A.T.S.E. locals, such as prop makers or grips, and others, is that correct?

A. That is correct.

Q. So that the furnishing of men to do the work of people who [1476] were out because of the strike in that respect was merely a transfer of a man from let us say the prop shop to the carpenter shop, or from the grip department to the paint shop, or carpenter shop, and similar transfers, is that correct? A. That is true.

Q. In addition to such transfers of persons already employed in the studio from one department to another, there were also new people brought

(Testimony of Roy M. Brewer.)

into the studios for the first time, were there not?

A. There were undoubtedly some, yes.

Q. This \$3.50 per day that was paid after the termination of the strike, was not limited only to those new people who had worked in the studios for the first time during the strike, was it?

A. No.

Q. And it was given to those persons who had been employed in the studios long before the strike, is that correct?

A. That's correct.

Q. And who continued to be employees, and are employees of the studios today, in many cases?

A. That is true, but in different capacities.

Q. Those who were, for example, prop makers and had worked in the carpenter shop during the strike, went back to their prop making in most cases, did they not? [1477]

A. I think so, most of them.

Q. And that is true of grips who might have been transferred to other work during the strike?

A. I think so.

Q. So, when you call it "severance pay," it refers to the pay received for working outside of their jurisdiction during the strike, is that correct?

A. That is substantially true. They did not receive any pay for any work—for any job which they could continue to do. It was the payment for work which they had done which they could no longer do. So, so far as the jobs were concerned, they

(Testimony of Roy M. Brewer.)

were separate from those jobs by reason of the settlement, and that was the original commitment on severance pay, that any man who was eliminated from a job which he held by reason of the Cincinnati agreement should get severance pay.

Q. Those were jobs which they had not held before the strike?

A. That's right, and which they—the determination was that the jobs which they could not hold after the settlement—in other words, any man that was going to remain on a job was not entitled to that \$3.50 a day.

Q. So that if a man had been a prop maker before the strike, and remained a prop maker all the way through the strike, and continued a prop maker after the strike, he would not get [1478] the \$3.50?

A. He got nothing. [1479]

* * *

Q. You have referred to the A.F.L. directive at Cincinnati on October 25, 1945. You were not there at that time, were you?

A. No, I was not at Cincinnati.

Q. You were advised by Mr. Walsh as to what occurred there?

A. Right.

Q. I am referring now to Richard Walsh, your international president. Were you advised by Mr. Walsh also as to who represented the producers at the Cincinnati meeting?

A. Yes.

Q. What were you advised in that respect?

(Testimony of Roy M. Brewer.)

A. Eric Johnston represented the majors and Donald Nelson represented the independents.

Q. You testified also that when the question arose over the interpretation of the directive, some of the people from Hollywood here flew to Washington to check the minutes, or [1480] something of that sort. Do you know who went to Washington for that purpose?

A. Well, Mr. Walsh went, Mr. Benjamin went—attorney for producers—Mr. Mannix went and I think Mr. Johnston.

Q. Eric Johnston?

A. Yes, Mr. Eric Johnston. And Mr. Lindelof and Mr. Hutcheson, I understand, came from Indianapolis. At least, Mr. Hutcheson did.

Q. For the purpose of this record, Mr. Hutcheson is William Hutcheson, the international president of the carpenters union?

A. The general president.

Q. And Mr. Lindelof is the——

A. General president of the Brotherhood of Painters.

Q. During the strike, or immediately after the strike, Mr. Brewer, did you ever advise any of the producers not to employ or not to reemploy or not to give work to any persons who had formerly been members of the I.A.T.S.E., but who had refused to work outside of their jurisdiction, or had refused to cross picket lines during the strike?

(Testimony of Roy M. Brewer.)

A. I discussed the Warner Bros. situation with Mr. Sachs.

Q. When?

A. Sometime after the strike. I saw a notice in the paper, some paper, that Mr. Sorrell was demanding the reinstatement of these men under the terms of the strike settlement. [1481]

Trial Examiner Riemer: What are "these men"?

The Witness: The I. A. men who had observed the picket lines, that Mr. Sorrell was interpreting the directive so as to include that these men were to be reinstated to their jobs. I called Mr. Sachs and told him that this was not our understanding of the strike settlement, Mr. Sorrell had no right to represent any I. A. man, and that we would not agree that any of our I. A. men should be displaced by reason of the reinstatement of these men, that we had had to fill these jobs at a time when it was very difficult to get men to do the work, and that we could not agree that these men that we had supplied should be displaced, and that we did not consider he had any right to recognize the strike settlement which Sorrell had made as applying to these men, that these men were I. A. men, and their rights were to be determined by the I. A. with respect to the I. A. and the producers, and not Mr. Sorrell and the producers.

I further told him that we had no objection to employing them, but not in such a way as to dis-

(Testimony of Roy M. Brewer.)

place or affect the rights of any other I. A. man unless that was in accordance with our rules and regulations.

Q. (By Mr. Rissman): You objected to Herbert Sorrell representing or trying to represent the I. A. men, is that correct? A. I did, yes.

Q. My question is: Did you at any time tell any producer [1482] not to employ or not to reemploy any I.A.T.S.E. men who had failed to cross the picket line, or who had refused to work outside of his jurisdiction during the strike?

A. Only insofar as I have stated.

Q. And you did nothing further in that respect at all? A. Nothing further.

Q. As far as you know, did any of the business agents under your supervision or direction give any such instruction or advice to any of the producers?

A. If they did, they did it contrary to my instructions.

Q. What was your instruction?

A. My instructions were that these men were to be given all of their rights as a member of the union, but they were not to be recognized as having any right to reinstatement on jobs which they had failed to fill when they had been requested to do so by the union.

Q. Did you ask any of the producers to lay off or discharge men after October 31st, if those men had refused or failed to work outside of their jurisdiction or cross the picket line during the strike, after the strike? A. No, sir.

(Testimony of Roy M. Brewer.)

Q. If any such conclusion was reached by the producers, it was without any request from your organization, is that correct?

Mr. Mitchell: Wait a minute. Object to that on the ground it is speculative and contains an inference which is improper. [1483]

Trial Examiner Riemer: Sustained.

Q. (By Mr. Rissman): Then to your knowledge, did anyone else representing the I.A.T.S.E. ask the producers or the Association of Motion Picture Producers, Inc., or any of the officers or agents of that association, to request the layoff or dismissal, after October 31, 1945, of any person who had failed to cross the picket lines or who had refused or failed to work outside of the jurisdiction during the strike? A. Not to my knowledge.

Q. During that strike period you were the highest ranking I.A.T.S.E. officer on the scene, other than Mr. Walsh, were you not?

A. That's right.

Q. You were here continuously during that period, is that correct, and have been since March 12, 1945?

A. Well, I was gone for a period of three weeks, I think, in July, 1945; the latter part of June and the first part of July.

Q. Except for that three-week period, you have been here continuously, have you not?

A. Yes.

Q. Mr. Walsh has been in and out on various occasions, is that correct?

(Testimony of Roy M. Brewer.)

A. That's right. I would say that during the year he spent [1484] at least four months here.

* * *

Q. (By Mr. Mitchell): You spoke about meeting with the Warner Bros. prop makers and telling them of President Walsh's directions to do whatever was necessary to keep the studios open. Did you tell the I.A. members in the other studios struck by the Conference of Studio Unions that they also were to do the same thing?

A. Yes, I went to many studios during those first weeks. I wasn't familiar with them because it was my first trip here but I recall going to at least five of them during that first week and making similar talks.

Q. You also made a statement about some instructions you gave to your business agents about what they were to try to have accomplished in respect of reinstatement of men to jobs, referring to the I.A.T.S.E. members who had refused to work as directed by the studios during the strike. Did you tell the business agents that the I.A.T.S.E. members who had refused to work as directed by the studios were not to be employed by the studios in the event of a vacancy?

A. Oh, no.

Q. Well, just what did you tell them? [1491]

A. Well, I told them they were to be employed on the same basis as any other I. A. man and they were not to have any preference because of the fact that they had worked there previously and had left

(Testimony of Roy M. Brewer.)

because they wouldn't do the things that they had done, but that they should have the same rights, that they could put their names on the books and be given the first assignments in accordance with their rights as I. A. members.

Q. Did you say anything to them about whether they should try to prevent I.A.T.S.E. men then working from being displaced by the return of these I.A.T.S.E. men who had refused to work during the strike?

A. Yes, because if they were put to work the same as any other I.A. man, they couldn't replace another man. That was exactly the point I was trying—that was exactly the instructions I did give them, that they could not be given preference and thereby displace another man, but if there was a job available to which they were entitled, they were to have it. [1492]

* * *

Mr. Mitchell: Mr. Trial Examiner, I will ask that the National Labor Relations Board take judicial notice of the [1531] following matters.

Trial Examiner Riemer: Does that apply to me, also, Mr. Mitchell?

Mr. Mitchell: Well, I presume you, as an agent of the Board, are asked to do the same, yes. I am not trying to be personal about it; I mean as an organization.

These matters are matters which are of record with the Board.

That on February 28, 1945, respondents in this case, among other employers, filed with the Twenty-first Regional Office of the National Labor Relations Board an employers' representation petition numbered 21-RE-20, which petition read as follows:

I will read it to you, or I will ask the reporter to copy it into the record as if I had read it, whichever you wish.

Trial Examiner Riemer: Is it long?

Mr. Mitchell: Yes, and others will be long, but I will do it either way you want.

Trial Examiner Riemer: If this is going to be the subject of controversy, I think it might be best if you read it into the record. Otherwise I would just have to take time off to read them.

Mr. Mitchell: Very well. I will read it into the record. [1532]

Mr. Rissman: Mr. Mitchell, he suggested that you read it into the record, not submit it as an exhibit.

Trial Examiner Riemer: Off the record.

(Discussion off the record.)

Trial Examiner Riemer: On the record.

Mr. Mitchell:

“United States of America, Before the National
Labor Relation Board, Twenty-First Region

“Case No. 21-RE-20

“In the Matter of:

“COLUMBIA PICTURES CORPORATION;
LOEW’S, INCORPORATED; PARAMOUNT
PICTURES, INC.; RKO RADIO PIC-
TURES, INC.; REPUBLIC PRODUC-
TIONS, INC.; SAMUEL GOLDWYN, INC.,
LTD.; TWENTIETH CENTURY-FOX
FILM CORPORATION; UNIVERSAL PIC-
TURES COMPANY, INC.; and WARNER
BROS. PICTURES, INC.,

“and

“SCREEN SET DESIGNERS, ILLUSTRATORS
& DECORATORS, LOCAL 1421, AFL,

“and

“INTERNATIONAL ALLIANCE OF THE-
ATRICAL STAGE EMPLOYEES AND
MOVING PICTURE MACHINE OPER-
ATORS OF THE UNITED STATES AND
CANADA, LOCAL 44, AFL.

“PETITION BY EMPLOYER FOR INVESTI-
GATION AND CERTIFICATION OF REP-
RESENTATIVES PURSUANT TO SEC-
TION 9(c) OF THE NATIONAL LABOR
RELATIONS ACT

“Name of employer: Columbia Pictures Corporation; Loew’s, Incorporated; Paramount Pictures, Inc.; RKO Radio Pictures, [1533] Inc.; Republic Productions, Inc.; Samuel Goldwyn, Inc., Ltd.; Twentieth Century-Fox Film Corporation; Universal Pictures Company, Inc.; and Warner Bros. Pictures, Inc.

“Address: c/o Milton H. Schwartz, Pacific Mutual Building, Los Angeles 14, California.

“General nature of business: Production of motion pictures.

“Approximate total number of employees: 18,000.

“Description of the bargaining unit or units which the competing labor organizations described below claim appropriate: Petitioners are informed that Local 1421 claims that the bargaining unit should consist of Set Designers, Model Builders, Illustrators, Assistant Costume Designers and Costume Illustrators.

“Petitioners are informed that the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 44, claims that the bargaining unit should consist of property men, including Interior Decorators, sometimes known as Set Dressers.

“Approximate number of employees in such unit or units: Local 1421 Unit: Mean employment of 290. I.A.T.S.E., Local 44 Unit: Mean employment of 1420.

“Name or names and addresses of all known in-

dividuals or labor organizations which claim to represent any of the employees in the claimed bargaining unit or units described above: [1534] Screen Set Designers, Illustrators and Decorators, Local 1421, AFL, 9441 Wilshire Boulevard, Beverly Hills, California. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 44, AFL, 1007 South Grand Avenue, Los Angeles 15, California.

“The undersigned hereby alleges that a question or controversy has arisen concerning the representation of employees in that two or more of the labor organizations named above have presented to the undersigned employer conflicting claims that each represents a majority of the employees in the unit or units set forth above, more particularly as follows: Local 1421 claims that Interior Decorators, sometimes known as Set Dressers, constitute a part of the above-described Unit claimed by Local 1421, and that Local 1421 represents the employees in that unit. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 44, claims that Interior Decorators, sometimes known as Set Dressers, constitute a part of the above-described Unit claimed by Local 44, and that Local 44 represents the employees in that Unit.

“Any other relevant facts: The undersigned further alleges that said question concerning [1535] representation is a question affecting commerce within the meaning of said act.

“The undersigned requests that pursuant to Section 9(c) of the National Labor Relations Act, the National Labor Relations Board investigate such controversy and certify to the parties the name or names of the representatives that have been designated or selected by said employees.

“Signature of employer filing the petition.

“(If filed by a corporation, give the name and official position of the person acting for the corporation.)

“COLUMBIA PICTURES
CORPORATION,

“LOEW’S, INCORPORATED,

“PARAMOUNT PICTURES,
INC.,

“RKO RADIO PICTURES,
INC.,

“REPUBLIC PRODUCTIONS,
INC.,

“SAMUEL GOLDWYN, INC.,
LTD.,

“TWENTIETH CENTURY-
FOX FILM CORPORATION,

“UNIVERSAL PICTURES
COMPANY, INC.,

“WARNER BROS. PICTURES,
INC.,

“By /s/ MILTON H. SCHWARTZ,

“Attorney for said
Companies.

“Pacific Mutual Bldg.,

“Los Angeles 13, Calif.

“Subscribed and sworn to before me this 27th day of February, 1945, at Los Angeles, California.

“[Seal] /s/ ELLOWENE EVANS,

“Notary Public”

I also ask that the Board take judicial notice of the fact that on January 11, 1945, a petition for certification of representatives was filed in Case No. 21-R-2630, and in Cases Nos. 21-R-2622, 2624, 2625, 2626, 2627, 2628, 2629 and 2630, in which the petitioner was Screen Set Designers, Illustrators and Decorators, Local 1421, affiliated with the Brotherhood of Painters, Paperhangers and Decorators of America, A.F.L., and in which the unit was stated as all set estimators and set controllers, said petition being filed with respect to each of respondents in this proceeding and the other employers named in Case No. 21-RE-20; that:

On January 26, 1945, a first amended petition was filed in those same cases, which first amended petition reads as follows:

“United States of America

“National Labor Relations Board

“FIRST AMENDED PETITION FOR
CERTIFICATION OF REPRESENTATIVES

“The undersigned Petitioner hereby alleges that the [1537] Employer named below has refused to recognize Petitioner as the exclusive collective bargaining agent of all the employees in the bargaining unit hereinafter described and that such refusal has given rise to a question concerning representation affecting commerce within the meaning of the National Labor Relations Act. Pursuant, therefore, to Section 9(c) of said Act, Petitioner requests the National Labor Relations Board to investigate such controversy and certify to the parties the name or names of the representatives designated or selected by the employees.

“1. Name of employer: Columbia Pictures Corporation.

“2. Address of establishment: 1438 Gower, Hollywood, California.

“3. Industry: Film producers.

“Do not write in this
space.

“Case No. 21R2622.

“Docketed.

“4. Petitioner: Screen Set Designers, Illustrators & Decorators, Local 1421, affiliated with the

Brotherhood of Painters, Decorators & Paperhangers of America, AFL.

“(Indicate affiliation, if any.)

“5. The alleged appropriate bargaining unit (describe below groups of employees or individual job classifications) Includes: All set designers, model builders, illustrators, assistant costume designers, costume illustrators, set controllers and set estimators. [1538]

“6. The Unit contains approximately 24 employees, of which number all have designated or selected petitioner as their bargaining representative.

“7. The following individuals or labor organizations claim to represent employees in the Unit: None.

“By /s/ GEORGE E. BODLE,

“For Bodle & Pestana.

“Subscribed and sworn to before me this 26th day of January, 1945, at Los Angeles, California.

“/s/ MICHAEL I. KOMAROFF,

“Field Examiner, 21st Region, National Labor Relations Board.”

That identical first amended petitions were filed with respect to each of the other respondents named in this proceeding, and with respect to the employers named in Case No. 21-RE-20; that:

On February 28th, 1946, Cases Numbered 21-RE-20, 21-R-2622 and 21-R-2624 to 21-R-2630, inclusive,

were consolidated by order of the National Labor Relations Board; that: [1539]

On March 1, 1945, in such consolidated cases, a notice of hearing was issued, notifying the parties that the consolidated case would be heard on March 7, 1945; that:

On March 7, 1945, such case came on for hearing; that:

On the first day of that hearing, as appears at page 16 of the transcript thereof, Mr. Pestana, attorney for Local 1421, said:

"At this time, Mr. Examiner, I should like to move that Local 1421's petition be amended to include the set decorators.

"Trial Examiner Nicoson: Is that an amendment directed to the unit description?

"Mr. Pestana: That is right. I think the 'and estimators,' that should be 'and set decorators.'

"Trial Examiner Nicoson: Would you tell us how you would now like the unit description to read in its entirety?

"Mr. Pestana (Reading): 'All set designers, model builders, illustrators, assistant costume designers, costume illustrators, set controllers, set estimators and set decorators.'

"Trial Examiner Nicoson: Do you wish now to amend all of your petitions in this proceeding to so read?

"Mr. Pestana: Yes." [1540]

I will also ask the Board to take judicial notice of the fact that at page 21 of the transcript of the

hearing on that same day, Mr. Nicoson, the Trial Examiner, ruled as follows, with respect to Mr. Pestana's amendment or proposed amendment of the Local 1421 petition:

"First let me say, if I have not granted your leave to amend—so we will have that out of the way—it is now granted.

"Mr. Pestana: We should like at this time to request permission of the Board to intervene in the petition filed by the producers, and, with authority or permission from the Board, to file a written motion of intervention at a little later time.

"Trial Examiner Nicoson: That is allowed."

I also ask the Board to take judicial notice of the fact that at page 24 of the same transcript on the same day, March 7, 1945, Mr. Michael Luddy, attorney for the I.A.T.S.E., and Local 44 thereof, states as follows:

"Mr. Nicoson, Local 44 at this time moves for permission to intervene in Cases Nos. 21-R-2622 to 21-R-2630, inclusive, and will, during the course of the day, certainly by tomorrow morning, file a short formal petition if its motion is at this time granted. The basis of its motion being its claims to jurisdiction over the employees who are described as model builders [1541] in the first amended petitions have been amended this morning as against Local 1421 only.

"Trial Examiner Nicoson: Is that the only category you have an interest in, the model builders?

"Mr. Luddy: I would like to make a similar mo-

tion to include set decorators. I think it can all be made in one motion by making it model builders and set decorators. May my motion be amended accordingly?

“Trial Examiner Nicoson: The motion to intervene is granted. All motions to intervene are granted which have been heretofore made.”

That thereafter Mr. Luddy filed the following petition for intervention:

“United States of America, Before the National Labor Relations Board, Twenty-First Region

“Case No. 21-RE-20

“COLUMBIA PICTURES CORPORATION;
LOEW’S INCORPORATED; PARAMOUNT
PICTURES INC.; RKO RADIO PICTURES,
INC.; REPUBLIC PRODUCTIONS, INC.;
SAMUEL GOLDWYN, INC., LTD.; TWEN-
TIETH CENTURY-FOX FILM CORPORA-
TION; UNIVERSAL PICTURES COM-
PANY, INC.; and WARNER BROS. PIC-
TURES, INC.

“and

“SCREEN SET DESIGNERS, ILLUSTRATORS
& DECORATORS, LOCAL 1421, AFL.

“and

“INTERNATIONAL ALLIANCE OF THEAT-
RICAL STAGE EMPLOYEES AND MOV-
ING PICTURE MACHINE OPERATORS

OF THE UNITED STATES AND CANADA,
LOCAL 44, AFL.

“PETITION FOR INTERVENTION

“State of California,

“County of Los Angeles—ss.

“Michael G. Luddy, being first duly sworn, does, on oath, depose and say:

“That he is a member of the firm of Bodkin, Breslin & Luddy; that said firm of Bodkin, Breslin & Luddy, together with Sidney Sampson, are attorneys for Local 44 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (IATSE), a voluntary association, being an International labor organization affiliated with the American Federation of Labor with headquarters in the City of New York, State of New York; that for and on behalf of said Local 44, affiant respectfully petitions the National Labor Relations Board for permission to intervene in the above-entitled proceedings.

“That for and on behalf of said proposed Intervenor, affiant respectfully represents:

“(a) That jurisdiction, pursuant to grant thereof by the American Federation of Labor over Set [1543] Dressers, sometimes known as Interior Decorators, and the work and services performed by them is vested in the proposed Intervenor, and that Screen Set Designers, Illustrators and Decorators, Local 1421, of the Brotherhood of Painters,

Decorators and Paperhangers of America, affiliated with the American Federation of Labor, does not have jurisdiction of said Set Dressers, sometimes called Interior Decorators, either through grant of jurisdiction from the American Federation of Labor, or otherwise.

“(b) That the persons employed as set forth in the petition by employer for investigation, etc., as Set Dressers, sometimes called Interior Decorators, are not of themselves an appropriate bargaining unit; that the said IATSE is by reason of jurisdiction, past history and previous rulings of this Board, the proper bargaining agent of said Set Dressers, sometimes called Interior Decorators; that said Local 44, pursuant to its jurisdiction and chart, has jurisdiction over said Set Dressers, sometimes called Interior Decorators.

“Wherefore, Petitioner respectfully prays an Order of this Board authorizing said Local 44 to intervene herein.

“[Seal] A. B. LUDDY,

“Subscribed and sworn to before me this 7th day of March, 1945.

“[Seal] A. B. LUDDY,

“Notary Public in and for Los Angeles County, California.” [1544]

That the hearing before Trial Examiner Maurice Nicoson proceeded on March 7, 8, 9, 10, 12, 13, 14, 15, 16 and 17, 1945.

I will also ask the Board to take judicial notice of the fact that in a proceeding filed under the provisions of the War Labor Disputes Act, numbered S-1539, and bearing the local number 21-WLD-54——

Trial Examiner Riemer: Will you repeat those, Mr. Mitchell?

Mr. Mitchell: S-1539 and 21-WLD-54—under the title Loew's, Inc., et al., Screen Set Designers, Illustrators and Decorators, Local 1421, affiliated with the Brotherhood of Painters, Decorators and Paperhangers of America, filed a petition for an election—well, a request for a strike vote, as Mr. Rissman suggests, on December 6, 1944.

Trial Examiner Riemer: December 6, 1944?

Mr. Mitchell: December 6, 1944. Well, whatever document was filed is not available here in this office but I ask the Board to take judicial notice of it. I understand it is in Washington. That pursuant to such document as was filed and in accordance with the provision of the War Labor Disputes Act, the Board, the National Labor Relations Board, conducted a vote among the following voters who were designated as eligible voters in the notice of secret ballot issued by the board, such voters being employees of each of [1545] respondents' studios, and in addition thereto, Paramount and Universal:

“All set decorators, set controllers, set estimators, set designers, sketch artists, model builders, and costume illustrators who were employed by Co-

lumbia Pictures Corporation”—and in each instance the appropriate notice specified the name of the appropriate company—“during the payroll period ending December 16, 1944, excluding all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action.”

That said notice of secret ballot specified as the time and place:

“Between the hours of 9:45 and 10:45 a.m.,
January 6, 1945,”

at an appropriate place in each studio.

That said notice contained a copy of the official ballot to be presented to eligible voters and that said ballot contained the following:

“Major issues involved in the dispute: The objection of the screen set designers, illustrators and decorators, Local 1421, to the failure of Columbia Pictures Corporation”—and in each other case the appropriate producer was named—“to recognize it as [1546] exclusive bargaining agent for its set decorators.”

I ask the Board further——

Trial Examiner Riemer: One thing that you have not stated—well, if the Board takes judicial notice of the strike ballot, I suppose the date doesn't matter.

Mr. Rissman: The date of the vote.

Mr. Mitchell: I ask the Board further to take judicial notice that the election was conducted on

the date specified, January 6, 1945, and that with respect to each of respondents and the two other producers involved in the election, a majority of the employees in the unit or a majority of the eligible voters voted in favor of the proposition, namely:

“Do you wish to permit an interruption of war production in war time as a result of this dispute?”

Those are the matters of which I ask the Board to take judicial notice. I think the record is clear here that on March 12, 1945, Local 1421 struck respondent producers and other producers.

Respondents rest. [1547]

* * *

Trial Examiner Riemer: Gentlemen, I think there has been enough discussion. The importance of the issue has been sharply focused and let's go ahead.

What about this question of charges, Mr. Rissman? You were going to check your files to determine whether Stanley, Howe and Coffey had been named in charges heretofore filed.

Mr. Rissman: If the Examiner please, my investigation at the Regional office on this question discloses the following, and if necessary I can get persons in to testify with respect to it, and that is this: That on January 4, 1946, Mr. Margolis brought in certain amended charges in these various cases. That one of them that was brought in was entitled “Third Amended Charge” in Case 21-C-2564. That one names as individual employees against whom

Warner Bros. engaged in 8(3) conduct, in addition to those named in the Third Amended Charge in that case which is attached to the complaint which is on file; Fred Seward, B. Kenneth Coffey and Willis Howe, as charging parties. The person—the young lady who is in charge of filling in the filing dates on these documents has no recollection of this document being rejected and is unable to explain why there [1559] was no filing date placed on it. I spoke with Mr. Komaroff, the field examiner, who was investigating these cases at that time. He has no knowledge as to why no filing date was put on this third amended charge, but he does tell me that he investigated with respect to Seward, Coffey and Howe, and I won't go into all of his investigations, but he does tell me that he did confer with Mr. Mitchell as the attorney for various respondents and particularly with respect to all of the Warner employees named in this document which was signed by Mr. Margolis before a notary on January 4, 1946.

Now, whether or not that was actually filed and received for filing beyond that does not make too much difference because we do have this defect in the pleadings which are in evidence. The document which is attached to the third amended charge—I mean to the consolidated complaint and the amended consolidated complaint in this case does not name Seward, Coffey and Howe.

Trial Examiner Riemer: Does it name Stanley?

Mr. Rissman: And it does not name Stanley,

either. Now, I don't know how Stanley's name was omitted.

Mr. Mitchell: Stanley is not named in any charge handed to the office or filed or otherwise or at all.

Mr. Rissman: That is right. Stanley's name was omitted. And investigation was conducted with respect to [1560] Stanley. He filed affidavits and everything else but through somebody's typographical omission his name was not included in the charge.

Mr. Mitchell: I will not agree that it was somebody's typographical omission. You don't mean to state that as a fact, do you?

Mr. Rissman: No, that is a conclusion. I don't know. I didn't do the typing.

With respect to Seward, Coffey and Howe, the file does indicate that they were treated as charging employees, and the complaint which was issued was based upon the substantive facts stated in this third amended charge, which is dated January 4, 1946.

You will note, Mr. Examiner, that all of the charges were amended on July 19, 1946, and that the principal amendment there was adding the name of the Association of Motion Picture Producers, Inc., to the charge so they could properly have them as parties to this proceeding.

The third amended charge which is attached to the complaint is different from the——

Trial Examiner Riemer: Excuse me for interrupting, Mr. Rissman.

What it boils down to is this, that the respondent has never been served with a copy of a charge nam-

ing Seward, Coffey, Howe and Stanley as discriminatees or employees whose rights have been violated. [1561]

Mr. Rissman: I would state it this way, Mr. Examiner:

The respondent was advised during the course of the investigation that charges were on file and were being investigated with respect to Seward, Coffey and Howe. I am not sure about Stanley, so I won't say. But, I am sure about those employees. The respondent was served with a complaint which named them, and the respondent was——

Trial Examiner Riemer: I said, "charge," didn't I?

Mr. Rissman: Respondent was advised——

Mr. Mitchell: Respondent was never served with a charge naming those people. There is no question about that, is there, Mr. Rissman?

Mr. Rissman: No, and there is no question, Mr. Mitchell, that respondent was advised about the charge, is there?

Trial Examiner Riemer: Gentlemen, this is a difficulty that comes up frequently in Board proceedings and practices, and it bespeaks irregularity and perhaps inefficiency on the part of the Regional office. I do not want to pass on that.

The question is whether it is a defect, a material defect and a fatal defect.

Mr. Rissman: I don't believe it is, Mr. Examiner.

Trial Examiner Riemer: That is the only issue.

The Board passed upon this and similar cases, and the Supreme Court has passed upon it in the National Liquors case. [1562]

Now, if there is a motion before me on which I have to rule, I will pass upon it.

Mr. Mitchell: I move that the complaint be dismissed as to Stanley, upon the ground that no charge whatsoever with respect to Stanley was either filed or handed to the Regional office, or otherwise, or at all. I move that the complaint be dismissed as to Seward, Howe and Coffey upon the ground that no charge was ever filed by the Regional office of the National Labor Relations Board, that no such charge was ever served upon respondents or any of them, and that in this proceeding respondents, before putting on any testimony with respect to other persons, reserved the right to make this motion without prejudice to them by reason of the putting on of testimony in order to facilitate the progress of the hearing.

Trial Examiner Riemer: All right, gentlemen.

Mr. Rissman: May I ask Mr. Mitchell one question?

Mr. Mitchell, to avoid the necessity of calling Mr. Komaroff with respect to it, do you concede that he did discuss with you, in the investigation of this case, the charges with respect to Seward, Coffey and Howe?

Mr. Mitchell: I do not remember that he discussed charges.

Mr. Rissman: If you want to go off the record, I can tell you—— [1563]

Mr. Mitchell: No, I will state it.

I remember talking with Komaroff, and I remember talking with him about Seward, Coffey and Howe. I never saw any charge filed by any of those persons, I was never shown one, and I don't know whether he was talking to me about charges that had been filed or about complaints that had been made, but he talked with me about the fact of those three men claiming that Warner Bros. had discriminated against them.

Trial Examiner Riemer: Gentlemen, I am prepared to rule. I do not want to hear any further argument.

The respondent's motion to dismiss the complaint with respect to John Stanley on the ground that respondent was not served with any charge naming the said Stanley is denied.

Respondent's motion to dismiss the complaint with respect to B. Kenneth Coffey, Willis Howe and Fred Seward, for the same reasons, that it was never served with any charge naming those individuals, is denied.

An exception to the respondent. [1564]

* * *

EDWIN T. HILL

a witness called by and on behalf of the Intervenor I.A.T.S.E., being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Luddy:

* * *

Q. Mr. Hill, I show you what appears to be a photostatic document and ask you what it is?

A. This is a true copy of the charter of Local 44.

(Thereupon the document above referred to was marked I.A.T.S.E.'s Exhibit No. 9 for identification.) [1574]

* * *

Trial Examiner Riemer: It may be admitted in evidence and marked as I.A.T.S.E. Exhibit No. 9.

(The document heretofore marked I.A.T.S.E.'s Exhibit No. 9 for identification was received in evidence.) [1575]

* * *

BOARD'S EXHIBIT NO. 5

[Title of District Court & Causes.]

Amended Consolidated Complaint

It having been charged by Joseph Cuccia and Irwin P. Hentschel that Columbia Pictures Corporation and Association of Motion Picture Producers, Inc.; by Robert Ames that Republic Productions, Inc. and Association of Motion Picture Producers, Inc.; by J. Harold Rogers, L. G. Batchelder, Paul DeSanctis, Carl H. Gidlund, G. M. Hand, Chas. Jensen, Leo Lamb, R. M. Lora, H. C. MacDonald, Don MacKellar, W. J. Simpson, George Stoica, Robert Bonning, W. G. White, Jesse L. Sapp, J. C. Goudie, Chas. J. Larson, Fred Seward, B. Kenneth Coffey and Willis Howe, that Warner Bros. Pictures, Inc. and Association of Motion Picture Producers, Inc.; by Robert L. Selgrath and George I. Groth that Loew's, Incorporated and Association of Motion Picture Producers, Inc.; by Eugene V. H. Mailes that Twentieth Century-Fox Film Corporation and Association of Motion Picture Producers, Inc.; by Forrest McLoney that R. K. O. Radio Pictures, Inc. and Association of Motion Picture Producers, Inc.; have engaged in and are engaging in certain unfair labor practices affecting commerce as set forth in the National Labor Relations Act, 49 Stat. 449, hereinafter referred to as the Act, the National Labor Relations Board, hereinafter called the Board, having issued its Order of Consolidation,

the Board by the Regional Director of the Twenty-First Region as agent of the Board, designated by the Board's Rules and Regulations Series 3 As Amended, Article IV, Section 1, hereby issues its Amended Consolidated Complaint and alleges the following:

1. Columbia Pictures Corporation,¹ hereinafter called respondent Columbia, a New York corporation having its principal office and place of business in New York City, is engaged in the manufacture of Motion Pictures. It also distributes motion pictures which it produces, though some of its pictures are distributed by foreign distributing companies and licenses. It holds the stock of various foreign distributing companies and of the following subsidiary corporations: Screen Gems, Inc., a California corporation and Columbia Pictures Corp. of Louisiana, Inc., a Louisiana corporation. During 1943 respondent Columbia purchased approximately 106,000,000 feet of film from vendors located in the City of Los Angeles, and expended approximately \$13,600,000 in the production of motion pictures. For the 1942-1943 season respondent Columbia produced 37 feature length motion pictures and made approximately 6,300 prints of these pictures, of which approximately 5,810 were shipped to points outside the State of California. Respondent

¹The motion picture producing companies who are named as respondents in this Consolidated Complaint, are sometimes collectively referred to as "respondent producers" or "respondent companies."

Columbia also produced, for use during the same season, 28 short subjects, and made approximately 2,900 prints of these pictures, of which approximately 2,744 were shipped to points outside the State of California. The prints and pictures hereinabove described were distributed by respondent Columbia through its office in New York City.

* * *

3. Warner Bros. Pictures, Inc., hereinafter called respondent Warner, is a Delaware corporation whose principal office and place of business is located in New York City. Its principal studio is located at Burbank, California, where it employs more than 3,000 employees, not including those employed on a daily basis. It distributes its motion pictures through Vitagraph, Inc., a subsidiary corporation, which maintains exchanges in 31 cities throughout the United States. Respondent Warner usually produces more than 30 feature length pictures each year at its Burbank studio. During its fiscal year ending August 27, 1943, it expended more than \$19,000,000 on the production of motion pictures. Some of the prints of its pictures are printed in California, but others are printed in New York from master negatives shipped from California for the purpose of printing and distribution. The pictures are distributed throughout the United States and foreign countries.

4. Loew's, Incorporated, hereinafter called respondent Loew, a Delaware corporation engaged in the business of producing and distributing motion

pictures, and whose principal office is located in New York City, operates studios located at Culver City, California. During the course of each calendar year, respondent Loew produces more than 30 feature length motion pictures, and a number of cartoons and short subjects. It causes the prints of these pictures to be distributed throughout the United States and various foreign countries. Respondent Loew employs many thousands of employees, both in the State of California and in the State of New York.

* * *

9. During the period from March 12, 1945, to October 31, 1945, employees in the motion picture industry, including employees of each of the respondent companies named herein, were on strike. This strike was called and conducted by Screen Set Designers, Illustrators, & Decorators, Local 1421, a labor organization affiliated with the American Federation of Labor.

10. Respondent Columbia, acting by and through its officers, agents and employees, more specifically but without limitation, Tom Stephens, Dave Vail, Joseph Gaspar and Vern Woodland, on or about March 19, 1945, did discharge Irwin P. Hentschel and on or about April 3, 1945, did discharge Joseph Cuccia and at all times since said dates respondent Columbia has refused and continues to refuse to reinstate said employees and each of them.

Respondent Columbia discharged said Hentschel and Cuccia and refused and continues to refuse to

reinstate them because they, together with other employees, refused to perform the work and take the jobs of striking employees and because said Hentschel and Cuccia engaged in concerted activities with other employees for their mutual aid and protection.

* * *

12. Respondent Warner acting by and through its officers, agents and employees, more specifically but without limitation, Francis C. Fuhrman, on or about March 19, 1945, did discharge J. Harold Rogers, L. G. Batchelder, Paul DeSanctis, Carl H. Gidlund, G. M. Hand, Chas. Jensen, Leo Lamb, R. M. Lora, H. C. MacDonald, Don MacKellar, W. J. Simpson, George Stoica, Robert Bonning, W. G. White, Jesse L. Sapp, Chas. L. Larson and Fred Seward, and each of them, and at all times since said date has refused and does now refuse to reinstate said employees and each of them.

Respondent Warner discharged said employees, and each of them, and refused and does now refuse to reinstate them because they, and each of them, together with other employees refused to perform the work and take the jobs of striking employees and because said employees engaged in concerted activities with other employees for their mutual aid and protection.

Respondent Warner acting by and through its officers, agents and employees, since October 31, 1945, has refused and failed and does now refuse and fail to reinstate to their former positions J. C.

Goudie, B. Kenneth Coffey, Willis Howe and John L. Stanley because said employees, and each of them, refused to pass or cross the picket line during the strike referred to in paragraph 14, above and because said employees engaged in concerted activities with other employees for their mutual aid and protection.

13. Respondent Loew acting by and through its officers, agents and employees, more specifically but without limitation, William R. Walsh, Albert Shutz, Fred Gabarie and Charles Fallon, on or about March 24, 1945, did discharge Robert L. Selgrath and refused and failed to reinstate him to his former position until December 19, 1945 and on or about March 23, 1945, did discharge George I. Groth and at all times since said date has refused and does now refuse to reinstate him to his former position.

Respondent Loew did discharge and refuse to reinstate said Selgrath and Groth and does now refuse to reinstate said Groth, as set forth above, because they, together with other employees, refused to perform the work and take the jobs of striking employees and because said Selgrath and Groth engaged in concerted activities with other employees for their mutual aid and protection.

* * *

16. Respondent Association acting by and through its officers, agents and employees, more specifically but without limitation, F. E. Pelton, on or about October 31, 1945, did advise and instruct

the other respondents named herein not to reinstate or employ employees who had refused to cross the picket lines during the strike referred to in paragraph 9, above and further advised the other respondents to lay off any such persons if they had previously been reinstated or employed.

17. By the acts set forth in paragraphs 10 through 16, both inclusive, as set out above, respondents and each of them, did engage in and are thereby engaging in unfair labor practices within the meaning of Section 8, subsection (3) of the Act.

* * *

20. By the acts set forth in paragraphs 10 through 16, both inclusive, hereof, and each of them, respondents did interfere with, restrain and coerce and are interfering with, restraining and coercing their employees in the exercise of the rights guaranteed to said employees by Section 7 of the Act, and did thereby engage in and are thereby engaging in unfair labor practices within the meaning of Section 8, subsection (1) of the Act.

21. The aforesaid acts of respondents as set forth in paragraphs 10 through 16, both inclusive, above, constitute unfair labor practices affecting commerce within the meaning of Section 8, subsections (1) and (3), and Section 2, subsections (6) and (7) of the Act.

22. The aforesaid acts of respondents as set forth in paragraphs 10 through 16, both inclusive, above, occurring in connection with the operations

of respondents described in paragraphs 1 through 8, both inclusive, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and territories of the United States and with foreign countries and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Wherefore, the National Labor Relations Board on the 3rd day of September, 1946, issued its Amended Consolidated Complaint against Association of Motion Picture Producers, Inc.; Warner Bros. Pictures, Inc.; Loew's Incorporated; RKO Radio Pictures, Inc.; Columbia Pictures Corporation; Republic Productions, Inc.; and Twentieth Century-Fox Film Corporation, respondents herein.

[Seal] /s/ STEWART MEACHAM,
Regional Director, National Labor Relations Board
Twenty-first Region.

Received Sept. 23, 1946.

BOARD'S EXHIBIT No. 7

United States of America Before the National Labor Relations Board, Twenty-First Region

In the Matter of

COLUMBIA PICTURES CORPORATION and
ASSOCIATION OF MOTION PICTURE
PRODUCERS, INC.,

and

JOSEPH CUCCIA,

and

CONSOLIDATED CASES AS NUMBERED.

Consolidated Cases Numbered 21-C-2505, 21-C-2562,
21-C-2563, 21-C-2564, 21-C-2660, 21-C-2662,
21-C-2664 and 21-C-2665

ANSWER OF RESPONDENTS ASSOCIATION
OF MOTION PICTURE PRODUCERS,
INC., COLUMBIA PICTURES CORPORA-
TION, REPUBLIC PRODUCTIONS, INC.,
WARNER BROS. PICTURES, INC.,
LOEW'S INCORPORATED, TWENTIETH
CENTURY-FOX FILM CORPORATION,
RKO RADIO PICTURES, INC.*

1. Admit the allegations of Paragraph 1 of the amended consolidated complaint.

*Respondents other than Association of Motion Picture Producers, Inc., will sometimes be referred to herein as "Respondent Producers."

2. Admit the allegations of Paragraph 2 of said amended consolidated complaint.

3. Admit the allegations of Paragraph 3 of said amended consolidated complaint.

4. Admit the allegations of Paragraph 4 of said amended consolidated complaint.

5. Admit the allegations of Paragraph 5 of said amended consolidated complaint, except deny that various subsidiary corporations of Twentieth Century distribute its motion pictures in the greater part of the United States.

6. Admit the allegations of Paragraph 6 of said amended consolidated complaint.

7. Deny the allegations of Paragraph 7 of said amended consolidated complaint, except admit and allege as follows:

(a) That the Association of Motion Picture Producers, Inc., is now and has been at all times since January 18, 1924, a corporation organized under and existing by virtue of the laws of the State of California, having its principal office and place of business in the City of Los Angeles, County of Los Angeles, State of California, and that said Association is a non-profit corporation organized for the following purposes:

To assist in fostering the common interests of those engaged in the motion picture industry in the United States, and especially in the

State of California, by establishing and maintaining the highest possible moral and artistic standards in motion picture production, by developing the educational as well as the entertainment value and general usefulness of the motion picture, by diffusing accurate and reliable information with reference to the industry, by reforming abuses relative to the industry, by securing freedom from unjust or unlawful exactions, and by other lawful and proper means.

To incur indebtedness in such amounts as may be fixed by the Board of Directors, to enter into contracts, to purchase or otherwise acquire and dispose of real or personal property that may be deemed necessary or convenient in the conduct of its business, and to do all acts and things which may be reasonably necessary, proper or convenient in bringing to full and complete fruition the accomplishment of the purposes hereinbefore specified.

(b) That said Association has permitted certain of its employees to perform services for the members of said Association as individual entities and that said employees have engaged in and are now engaging in the following activities on behalf of the individual members of said Association and pursuant to the direction of said individual members and not pursuant to the directions of said Association:

(1) The ascertainment of facts pertaining

to wages, hours and working conditions in the motion picture industry;

(2) The analysis and dissemination of information so obtained;

(3) The representation of members of said Association as individual entities in their respective labor relations with their employees and in collective bargaining negotiations and adjustment of labor disputes;

(4) The representation of members of said Association as individual entities before the Board, its agents and various other governmental advisory or arbitration commissions or bodies;

(5) In general to advise, instruct and confer with members of said Association as individual entities in matters pertaining to their employer-employee relations.

8. Deny the allegations of Paragraph 8 of said amended consolidated complaint.

9. Deny the allegations of Paragraph 9 of said amended consolidated complaint, except as follows:

(a) Respondents admit and allege that on March 12, 1945, Screen Set Designers, Illustrators & Decorators Local 1421 of the International Brotherhood of Painters, Decorators and Paperhangers of America, affiliated with the American Federation of Labor, called a strike against Respondent Producers and that it conducted said strike during

the period from March 12, 1945, to October 31, 1945; that prior to the calling of said strike both said Local 1421 and Local 44 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, affiliated with the American Federation of Labor, had made conflicting claims as to the appropriate unit in which set decorators employed by Respondent Producers should be included for purposes of collective bargaining, and that both of said American Federation of Labor unions had claimed the right to represent set decorators employed by Respondent Producers for purposes of collective bargaining; that by reason of said conflicting claims Respondent Producers did, on February 27, 1945, file an Employers' Representation Petition before the National Labor Relations Board and that on March 7, 1945, said Board commenced a hearing pursuant to the provisions of Section 9(a) of the National Labor Relations Act; that in the midst of said hearing, on March 12, 1945, said Local 1421 called a strike against Respondent Producers for the purpose of forcing them into abandoning their neutral position of recognizing neither contesting Union pending the decision of said Board, and of forcing them into recognizing said Local 1421 as the collective bargaining representative of set decorators immediately and without waiting for the decision of said Board; and that said Local 1421 conducted said strike from March 12, 1945, to October 31, 1945.

(b) Respondents admit that some members of said Local 1421 were on strike from March 12, 1945, to October 31, 1945, but are without knowledge as to whether all members of said Local 1421 were on strike during said period.

(c) Respondents are without knowledge as to whether employees other than members of said Local 1421 were on strike, but allege that some of the employees of Respondent Producers failed to report for work during said period of said strike but that most of the employees of Respondent Producers continued at work, and that during the period of said strike Respondent Producers continued the production of motion pictures.

* * *

11. Deny the allegations of Paragraph 11 of said amended consolidated complaint; except admit that on October 31, 1945, Robert W. Ames made application to Respondent Republic for employment and that Respondent Republic refused to employ him on said date, advising him that all calls for employment in the Prop Department were being placed with Local 44 of the IATSE & MPMO and that Respondent Republic would employ him should he be sent by said Local 44.

12. Deny the allegations of Paragraph 12 of said amended consolidated complaint, except admit and allege as follows:

(a) That on or about March 19, 1945, Respondent Warner delivered to J. Harold Rogers, L. G. Batchelder, Paul DeSanctis, Carl H. Gidlund, G. M.

Hand, Chas. Jensen, Leo Lamb, R. M. Lora, H. C. MacDonald, Don MacKellar, W. J. Simpson, George Stoica, Robert Bonning, W. G. White, Jesse L. Sapp, notices that said employees were being placed off payroll by reason of their refusal to do carpenter work as directed by Respondent Warner.

(b) That R. M. Lora, on November 13, 1945, W. G. White on November 8, 1945, and Jesse L. Sapp on November 8, 1945, made application to Respondent Warner for employment; that Respondent Warner refused to employ said persons by reason of the fact that no vacancies existed in their job classifications which they were qualified to fill, and that Respondent Warner continued to refuse to employ said persons for said reason and continues to refuse to employ Jesse L. Sapp by reason of the fact, as Respondent Warner is informed and believes and therefore alleges, that said Sapp is not and has not since June 17, 1946, been a member in good standing of Local 44 of the IATSE & MPMO.

13. Deny the allegations of Paragraph 13 of said amended consolidated complaint, except admit and allege that on or about November 14, 1945, Robert L. Selgrath made application for employment and Respondent Loew's refused to employ said Selgrath by reason of the fact that it had been advised by Local 80 of the IATSE & MPMO, with which it has a closed shop contract covering employees in said Selgrath's job classification, that said Selgrath was not a member in good standing

of said Union, and that upon being advised by said Local 80 on or about December 19, 1945, that said Selgrath had become a member in good standing of said Union, Respondent Loew offered employment to said Selgrath.

14. Deny the allegations of Paragraph 14 of said amended consolidated complaint.

15. Deny the allegations of Paragraph 15 of said amended consolidated complaint.

* * *

18. Deny the allegations of Paragraph 18 of said amended consolidated complaint.

19. Deny the allegations of Paragraph 19 of said amended consolidated complaint.

* * *

23. On or about June 14, 1946, said IATSE & MPMO notified Respondent Republic that Robert W. Ames had been expelled from membership in Local 44 of the IATSE & MPMO. On or about April 17, 1944, Respondent Republic entered into contracts with both IATSE & MPMO and Local 44 of IATSE & MPMO that they would employ in classifications covered by said contracts only workers who were members in good standing of said IATSE & MPMO and said Local 44 thereof. Said contracts are and ever since April 17, 1944, have been in full force and effect. Prior to his refusal to perform services for Respondent Republic, as directed by Respondent Republic, Robert W. Ames was employed in job classifications

covered by the contracts between said Local 44 and said IATSE & MPMO and Respondent Republic. Respondents are informed and believe and therefore allege that the IATSE & MPMO expelled said Robert W. Ames as stated in the notice delivered by the IATSE & MPMO to Respondent Republic.

* * *

25. On or about June 14, 1946, said IATSE & MPMO notified Respondent Twentieth Century that Eugene V. H. Mailes had been expelled from membership in Local 44 of the IATSE & MPMO. On or about April 17, 1944, Respondent Twentieth Century entered into contracts with both IATSE & MPMO and Local 44 of IATSE & MPMO that they would employ in classifications covered by said contracts only workers who were members in good standing of said IATSE & MPMO and said Local 44 thereof. Said contracts are and ever since April 17, 1944, have been in full force and effect. Prior to his refusal to perform services for Respondent Twentieth Century, as directed by Respondent Twentieth Century, Eugene V. H. Mailes was employed in job classifications covered by the contracts between said Local 44 and said IATSE & MPMO and Respondent Twentieth Century. Respondents are informed and believe and therefore allege that the IATSE & MPMO expelled said Eugene V. H. Mailes, as stated in the notice delivered by the IATSE & MPMO to Respondent Twentieth Century.

Wherefore, respondents pray that the amended consolidated complaint herein be dismissed.

O'MELVENY & MYERS, and
/s/ HOMER I. MITCHELL,
Attorneys for Respondents.

State of California,
County of Los Angeles—ss.

James S. Howie, being first duly sworn, deposes and says:

That Association of Motion Pictures Producers, Inc., one of the respondents herein, is a corporation and affiant is an officer thereof, to wit, the secretary, and makes this verification for and on behalf of said corporations.

That affiant has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to such matters that he believes it to be true.

/s/ JAMES S. HOWIE.

Subscribed and sworn to before me this 13th day of September, 1946.

[Seal] /s/ YZOBLE ROGERS,

Notary Public in and for said
County and State.

My Commission Expires March 26, 1949.

Received Sept. 23, 1946.

BOARD'S EXHIBIT NO. 7A

United States of America Before the National
Labor Relations Board Twenty-First Region

In the Matter of

COLUMBIA PICTURES CORPORATION and
ASSOCIATION OF MOTION PICTURE
PRODUCERS, INC.,

and

JOSEPH CUCCIA,

and

CONSOLIDATED CASES AS NUMBERED.

Consolidated Cases Numbered 21-C-2505, 21-C-2562,
21-C-2563, 21-C-2564, 21-C-2660, 21-C-2662,
21-C-2664, and 21-C-2665.

AMENDMENT TO ANSWER

Respondents, Association of Motion Picture Producers, Inc., Columbia Pictures Corporation, Republic Productions, Inc., Warner Bros. Pictures, Inc., Loew's Incorporated, Twentieth Century-Fox Film Corporation, RKO Radio Pictures, Inc. hereby amend the Answer on file in the above entitled and numbered proceeding by adding thereto the following paragraph:

26. On or about June 14, 1946, said IATSE & MPMO notified respondent Warner that George J. Stoica, Raymond M. Lora, Carl H. Gidlund, Jesse L. Sapp, and Leo L. Lamb had been expelled from

membership in Local 44 of the IATSE & MPMO. On or about the same date, said IATSE & MPMO notified respondent Warner that said L. G. Batchelder and G. M. Hand had been suspended from Local 44 of the IATSE & MPMO and from the IATSE & MPMO for a period of six months, commencing June 17, 1946. On or about April 17, 1944, respondent Warner entered into contracts with both IATSE & MPMO and Local 44 of IATSE & MPMO that they would employ in classifications covered by said contracts only workers who were members in good standing of said IATSE & MPMO and said Local 44 thereof. Said contracts are and ever since April 17, 1944 have been in full force and effect. Prior to their refusal to perform services for Respondent Warner as directed by Respondent Warner, the above named persons were employed in job classifications covered by the contracts between said Local 44 and said IATSE & MPMO and Respondent Warner. Respondents are informed and believe and therefore allege that the IATSE & MPMO expelled and suspended the above named persons, as stated in the notices delivered by the IATSE & MPMO to Respondent Warner.

O'MELVENY & MYERS, and

/s/ HOMER I. MITCHELL,

Attorneys for Respondents.

Received Sept. 24, 1946.

BOARD'S EXHIBIT NO. 8

Decision by Executive Council Committee of the
American Federation of Labor on Hollywood
Jurisdictional Controversy

Chicago, Illinois
December 26, 1945

In conformity with the Executive Council directive handed down during the Cincinnati meeting, October 15-24, 1945, the special committee arrived in Hollywood, California, early in December. The directive carried specific instructions, reading:

“International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada—Brotherhood of Painters, Decorators and Paperhangers of America—United Brotherhood of Carpenters and Joiners of America, et cetera.

“Hollywood Studio Union Strike and Jurisdiction controversy.

1. The Council directs that the Hollywood strike be terminated immediately.

2. That all employees return to work immediately.

3. That for a period of thirty days the International Unions affected make every attempt to settle the jurisdictional questions involved in the dispute.

4. That after the expiration of thirty days a committee of three members of the Executive Council of the American Federation of Labor shall investigate and determine within thirty days all jurisdictional questions still involved.

5. That all parties concerned, the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, the United Brotherhood of Carpenters and Joiners of America, the International Association of Machinists, the United Association of Plumbers and Steam Fitters of the United States and Canada, the Brotherhood of Painters, Decorators and Paperhangers of America, the International Brotherhood of Electrical Workers of America, and the Building Service Employees' International Union, accept as final and binding such decisions and determinations as the Executive Council committee of three may finally render."

All parties agreed to accept the decision of the committee and to be bound thereby. Through committee arrangements made prior to arrival, all organizations involved in the dispute participated in the initial meeting held Monday, December 3, 1945. A definite method of procedure was agreed upon and there was unanimity of opinion on the plan established.

Exhaustive hearings were conducted by the committee and a complete transcript, together with

various exhibits, were included in the record. Representatives of the Unions involved adhered to the following schedule:

Tuesday morning, December 4, 1945—Brotherhood of Painters, Decorators and Paperhangers of America.

Tuesday afternoon, December 4, 1945—International Brotherhood of Electrical Workers of America.

Wednesday morning, December 5, 1945—United Association of Plumbers and Steam Fitters of the United States and Canada.

Wednesday afternoon, December 5, 1945—Building Service Employes' International Union.

Thursday morning, December 6, 1945—International Association of Machinists.

Thursday afternoon, December 6, 1945—United Brotherhood of Carpenters and Joiners of America.

Friday, December 7 and Saturday afternoon, December 8, 1945—International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada.

On Saturday morning, December 8, the committee, along with one representative of each International Union listed in the Executive Council directive, visited the Paramount Studios in Hollywood. The committee investigated and inspected all phases of the work jurisdiction in dispute, through questioning the participants and reviewing completed work and items in the process of development.

The investigation revealed that a large portion

of the work has been in dispute over a long period of years. Records supplied from the files of the American Federation of Labor, including numerous agreements previously entered into, were made the subject of committee examination and study.

A number of International Unions not included in the Executive Council's directive requested permission to set forth their jurisdictional claims in the Motion Picture Industry. All such requests were denied and only those Unions listed in the original directive were included in the committee explorations and findings.

An analysis disclosed that three possible methods of solution could be utilized, i.e.,

(a) Strict adherence to craft or vertical lines of demarcation in the motion picture studios.

(b) Establishment of an industrial or horizontal union throughout the industry.

(c) A division of work designations within the industry patterned after previous agreements, negotiated mutually by the various crafts.

After careful and thorough study the committee unanimously agreed that the latter plan is unquestionably the best method of approach. It is the committee's considered opinion that such procedure affords the only plausible solution to a most difficult and complex problem.

Accordingly, this decision is based on that

premise and the below listed conclusions are final and binding on all parties concerned:

Findings

1. Brotherhood of Painters, Decorators and Paperhangers of America:

The committee finds that Set Decorators in the motion picture studios come within the jurisdiction of the Brotherhood of Painters, Decorators and Paperhangers of America.

All work in connection with window frosting on "props" belongs to the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada. Window frosting other than on "props" belongs to the Brotherhood of Painters, Decorators and Paperhangers of America.

The committee found that a local union known as the Screen Office Employees' Guild was chartered by the Brotherhood of Painters, Decorators and Paperhangers of America. Acting in an advisory capacity, the committee is of the opinion that all office workers in the motion picture studios rightfully come within the jurisdiction of the Office Employees International Union. It is to be understood that the committee is not deciding this question.

This decision is applicable to the Motion Picture Industry and none other, and is not to be construed as interfering with or disrupting any jurisdiction otherwise granted the Brotherhood of Painters, Decorators and Paperhangers of America by the American Federation of Labor.

2. International Brotherhood of Electrical Workers of America.

The committee finds that a workable agreement between the International Brotherhood of Electrical Workers of America and the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada was entered into on September 1, 1926, and amended on April 15, 1936. The agreement, including amendments, reads:

“Division of work by the International Brotherhood of Electrical Workers of America:

Section 1. All permanent installation work.

Sec. 2. All generator rooms.

Sec. 3. All portable generator sets.

Sec. 4. The laying of conduit (the same is designated as iron pipe of various sizes and lengths and is not to be confused with, or misunderstood to apply to flexible stage cable.)

Sec. 5. Installation and maintenance of all motors or generators where same are under the supervision of the electrical department of said studios.

Sec. 6. All repair work in and around the studio and all shop work, the same to apply to the manufacturing of new equipment and repairing of all electrical equipment. (April 15, 1936, Amendment) In the taking and recording of sound motion pictures, the operating of all generators and storage batteries. The installation, construction, maintenance, repair, all shop work and all work other than

operating, striking and setting of all sound equipment and effects used in taking and recording of sound motion pictures on stages and locations.

“Division of work by the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada;

Section 1. In the taking of motion pictures, the operating of all lights or lamps, and all lighting effects, and the setting up and striking same on stages or locations.

Sec. 2. The handling and operating of all equipment pertaining to the lighting of sets, such as plugging boxes, spiders, plugs, flexible stage cable, all lamps and all electrical effects pertaining to the taking of moving pictures such as wind, rain, snow, storm and all other effects, except where wind machine is operated electrically.

Sec. 3. The operating of all switchboards, whether they are permanent or portable; this is not to apply to generator rooms or portable generator sets, which shall be operated by members of the International Brotherhood of Electrical Workers of America.

Sec. 4. The operation of all moving picture machines. (April 15, 1936, Amendment) In the taking and recording of sound motion pictures, the operating of all sound equipment and all sound effects, and the setting up and striking of same on stages and locations.”

The committee rules that in the taking and recording of sound motion pictures, the International

Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada has jurisdiction over all running repairs. With that exception, the above quoted agreement, as amended, is and shall remain in full force and effect.

This decision is applicable to the Motion Picture Industry and none other, and is not to be construed as interfering with or disrupting any jurisdiction otherwise granted the International Brotherhood of Electrical Workers of America by the American Federation of Labor.

3. United Association of Plumbers and Steam Fitters of the United States and Canada;

The committee found that the representatives of the United Association of Plumbers and Steam Fitters of the United States and Canada, and the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada were currently negotiating an agreement and that differences of opinion were allegedly not of a major nature. Accordingly, the following is set forth as defining the work jurisdiction of both Unions in the Motion Picture Industry:

1. Full recognition of the United Association of Plumbers and Steam Fitters of the United States and Canada over all plumbing and pipe fitting work on all permanent and temporary facilities required by the Motion Picture Industry.

2. The United Association shall:

(a) Handle, set and hook up all plumbing equipment and all piping, or substitute conveyance, on or in connection with the sets when such fixtures are practical—that is, when a shower is used in a picture and water flows from same. This also applies to sinks, tubs and commonly known plumbing equipment.

(aa) The preceding paragraph (a) shall not apply when plumbing fixtures are of a dummy nature and are used solely for set dressing, or when a fixture is to be gagged or used as a special effect.

(b) Install all runs of piping up to the sets to take care of the supply of water, steam, draining, air, oil, gas, refrigerant, vacuum or other utility.

(c) Fill and drain all large tanks and pools and install all heating and filtering apparatus and equipment in connection therewith.

(d) Install all piping in connection with ice skating rinks and all plumbing equipment in connection therewith.

(e) Install all piping for air, water and waste for camera and projection machines.

(f) Install all piping for speaking tubes and sound conveyance.

(g) Install all piping and equipment for air conditioning work for the purpose of heating or cooling the stages.

(h) Install all sheet lead work.

(i) Perform all welding, brazing, soldering and fusing of all joints in connection with the work of the United Association of Plumbers and Steam Fitters of the United States and Canada.

(j) Install all sprinkler piping and equipment used in fire protection and fire control apparatus.

(k) Install all refrigeration piping and equipment except when coming within the scope of paragraph (aa) hereof.

(l) Install all chemical toilets and other portable plumbing convenience.

(m) Maintain, repair, alter, service, dismantle and strike all work included herein.

3. The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada shall:

(a) Handle and set all plumbing fixtures which are not practical, and which are used solely for set dressing.

(b) Build, handle, install, maintain, repair, strike, store and operate all special effects and gag fixtures. This to include rain effects, fire effects, water curtains, et cetera. Gag fixtures to include all fixtures which operate in an abnormal manner for the purpose of creating an effect to be photographed or recorded. However, when such effects require piping by other than special effects men, members of the United

States Association of Plumbers and Steam Fitters of the United States and Canada shall be given jurisdiction over such construction.

(c) Build, handle, install, maintain, repair, store, strike and operate all properties not excepted above, regardless of the manner of construction or the material used.

4. Any plumbing and/or pipe fitting generally recognized as a part of the plumbing trade, not herein excepted, shall be the work of the United Association of Plumbers and Steam Fitters of the United States and Canada.

The committee rules that the above work division is to be placed in full force and effect immediately. This decision is applicable to the Motion Picture Industry and none other, and is not to be construed as interfering with or disrupting any jurisdiction otherwise granted the United Association of Plumbers and Steam Fitters of the United States and Canada by the American Federation of Labor.

4. Building Service Employees' International Union:

The committee rules that the Building Service Employees' International Union has jurisdiction over the following classes of work in the Motion Picture Industry.

- (a) Police captains.
- (b) Police lieutenants.
- (c) Policemen.
- (d) Tour or clockmen.

- (e) Lot or set watchmen.
- (f) Fire captains.
- (g) Firemen.
- (h) Janitor foremen.
- (i) Janitor gang bosses.
- (j) Janitors (male or female including porters and matrons).
- (k) Window washers.
- (l) Signalmen.
- (m) Flagmen.
- (n) Whistlemen.

Provided that the jurisdiction over sweeping and cleaning up of stages and sets belongs to the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada.

This decision is applicable to the Motion Picture Industry and none other, and is not to be construed as interfering with or disrupting any jurisdiction otherwise granted the Building Service Employees' International Union by the American Federation of Labor.

5. International Association of Machinists:

The committee rules that the following language found in the American Federation of Labor, Boston, Massachusetts, Convention proceedings, October 6-17, 1930 (pp. 353-354), is applicable to the International Association of Machinists:

"1. It is understood by both parties that members of the I. A. of T. S. E. are recognized to have

jurisdiction to have charge of, to adjust, and operate all projectors and all appliance connected therewith.

"2. It is understood by both parties that members of the I. A. of M. are recognized as having jurisdiction over the processes in the manufacturing of motion picture machines.

"2a. It is agreed that members of the I. A. of T. S. E. shall have jurisdiction over the setting up and taking down of motion picture machines in such places as they are used for exhibition purposes.

"3. It is agreed by both parties that when temporary emergency running repairs are necessary the operator will make such repairs that are necessary to keep machine in operation."

The committee rules that the above work division be placed in full force and effect immediately. This decision is applicable to the Motion Picture Industry and none other, and is not to be construed as interfering with or disrupting any jurisdiction otherwise granted the International Association of Machinists by the American Federation of Labor.

The committee takes cognizance of the fact that the International Association of Machinists has discontinued its affiliation with the American Federation of Labor and expresses the hope that reaffiliation will soon take place.

6. United Brotherhood of Carpenters and Joiners of America:

The committee rules that the division of work agreement entered into between the United Brotherhood of Carpenters and Joiners of America and

the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada on February 5, 1925, and known as the "1926 Agreement" be placed in full force and effect immediately.

Division of work by the United Brotherhood of Carpenters and Joiners of America:

Section 1. All trim and mill work on sets and stages.

Sec. 2. All mill work and carpenter work in connection with studios.

Sec. 3. All work in carpenter shops.

Sec. 4. All permanent construction.

Sec. 5. All construction work on exterior sets.

Division of work by the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada:

Sec. 6. Miniature sets.

Sec. 7. Property building.

Sec. 8. Erection of sets on stages except as provided in Section 1.

Sec. 9. Wrecking all sets, exterior and interior.

Sec. 10. Erecting platforms for lamp operators and camera men on stages.

This decision is applicable to the Motion Picture Industry and none other, and is not to be construed as interfering with or disrupting any jurisdiction otherwise granted the United Brotherhood of Carpenters and Joiners of America by the American Federation of Labor.

7. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada:

The committee rules that the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada has jurisdiction over all work specifically designated and defined in the foregoing work divisions. It is understood, however, that such designation or definition shall in no wise affect jurisdictional grants awarded any National or International Union affiliated with the American Federation of Labor other than those to whom this decision is specifically made applicable.

This decision is applicable to the Motion Picture Industry and none other, and is not to be construed as interfering with or disrupting any jurisdiction otherwise granted the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada by the American Federation of Labor.

Signed:

FELIX H. KNIGHT,
Chairman.

W. C. BIRTHRIGHT,

W. C. DOHERTY,

Executive Council Committee of the American Federation of Labor.

Received Sept. 30, 1946.

BOARD'S EXHIBIT No. 9

(Copy)

Resedo, Calif.

Nov. 14, 1945

Loew's Incorporated

Mr. W. Walsh Labor Relation

Dear Sir:

I last worked in your Studio on the 23rd of March, 1945, where I did work as a Key Grip for 12 yrs.

I now request reinstatement to my job without discrimination. I would appreciate an immediate reply advising me when I should report for work or the reasons for the demise of my request.

Yours truly

JOHN L. SELGRATH,

Box 711, Resedo, Calif.

Received Oct. 1, 1946.

BOARD'S EXHIBIT No. 10

(Copy)

November 26, 1945

Mr. John L. Selgrath

Box 711,

Resedo, California

Dear Sir:

I have your letter of November 14, in which you request reinstatement to your position.

Please be advised that we operate the Grip Department by virtue of a closed-shop agreement with Local No. 80, I.A.T.S.E., and employ only members in good standing with that organization. At present your organization has advised us you are not in good standing with it. In the event your union advises us that you are in good standing, we will consider you for employment.

Very truly yours,

WILLIAM R. WALSH,

WRW:d Industrial Relations Manager.

Received Oct. 10, 1946.

BOARD'S EXHIBIT No. 12

(Copy)

Additional Instructions #2

Issued Oct. 31, 1945, 4:30 p.m.

Members of I.A.T.S.E. who bolted from their locals and/or refused to come to work during the strike, shall not return to their regular I.A. jobs without approval of the I.A. local concerned. If you have called any of these people by mistake, explain the error to the individual and lay off such people.

I.A. replacements who were borrowed from any of the original 12 I.A. locals shall not return to work in their respective Locals without making advance arrangements with the Business Agents.

/s/ F. E. PELTON.

Received Oct. 3, 1946.

RESPONDENTS' EXHIBIT No. 1

Producer-I.A.T.S.E. and M.P.M.O.

Basic Agreement of 1944

This Agreement, executed at New York City, New York, this 17th day of April, 1944, effective as of January 1, 1944, by and between severally,

Columbia Pictures Corporation

Loews Incorporated

Paramount Pictures Inc.

Republic Productions, Inc.

R.K.O. Radio Pictures, Inc.

Twentieth Century-Fox Film Corporation

Universal Pictures Company

Warner Bros. Pictures, Inc.

parties of the first part, hereinafter referred to, individually as a "Producer," and collectively as the "Producers," and the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, party of the second part, hereinafter referred to as the "International Alliance."

Witnesseth:

Whereas, the Producers, and each of them, are engaged in making, taking, producing and distributing of motion and still pictures throughout the United States and Canada, and elsewhere, and severally are desirous of entering into an agreement with respect to the matters and things hereinafter in this agreement set forth; and

Whereas, the International Alliance is an international labor union organized for the mutual benefit of its members, and is affiliated with the American Federation of Labor, and has heretofore chartered and established eleven local labor unions whose members are employed in the West Coast Studios of the Producers, and is desirous of entering into an agreement with respect to the matters and things hereinafter in this agreement set forth, so that the same may inure to the benefit of the members of the International Alliance; and

Whereas, said West Coast Studio Locals of the International Alliance are named as follows:

Affiliated Property Craftsmen.....	Local No. 44
Motion Picture Studio Grips.....	Local No. 80
Motion Picture Studio Projection- ists	Local No. 165
International Photographers of the Motion Picture Industries.....	Local No. 659
Film Technicians of the Motion Pic- ture Industry	Local No. 683
International Sound Technicians of the Motion Picture, Broadcast and Amusement Industry	Local No. 695
Motion Picture Costumers.....	Local No. 705
Make-Up Artists and Hair Stylists..	Local No. 706
Motion Picture Studio Laborers and Utility Workers	Local No. 727

Studio Electrical Technicians.....Local No. 728

Motion Picture Studio First Aid Em-

ployeesLocal No. 767

and which Local Unions are hereinafter collectively referred to as the West Coast Studio Locals, and

Whereas, the International Alliance represents that the majority of the employees of the Producers, and each of them, in the crafts and classifications of work described in Paragraphs III and IV hereof (all of said crafts and classification of work constituting an indivisible and integral bargaining unit), are members of the International Alliance and of one or more of its said West Coast Studio Locals:

Now, Therefore, in consideration of the mutual covenants, conditions and agreements herein contained, the parties covenant and agree as follows:

I. Term of Agreement

The term of this agreement shall be from January 1, 1944, until August 10, 1949, provided, however, that either party may, by written notice given on or before July 15, 1945, and on or before July 15, 1947, request renegotiation of the "Wage Scales, Hours of Employment and Working Conditions" of the West Coast Studio Locals. Such notice shall specify the changes desired in the "Wage Scales, Hours of Employment and Working Conditions." Preliminary negotiations shall commence promptly after September 1st of such

years and final negotiations shall commence promptly after the third Monday in October of said years for "Wage Scales, Hours of Employment and Working Conditions" which shall be effective as of January 1, 1946, and January 1, 1948, respectively. The negotiators representing each party on such final negotiations, shall have power to execute the agreement reached as the result of such negotiations.

II. Shop Agreement

The Producers severally promise and agree that each and all of their respective employees now or hereafter working in the studios of the Producers in the crafts and classifications of work described in Paragraphs III and IV hereof shall at all times be members in good standing of the International Alliance.

The Producers severally promise and agree during the term of this agreement to employ within the crafts and classifications of work herein described only those workers who are members in good standing of the International Alliance.

The International Alliance promises and agrees to furnish competent men to perform the work and render the services required by the Producers under the provisions of this agreement, and the agreements referred to in Paragraph IV hereof at such rates and under such conditions as are therein provided for and in accordance with the provisions of said agreements.

III. Scope of Agreement

The crafts and classifications of work subject to this agreement are the crafts and classifications described in the agreements referred to in Paragraph IV of this agreement, and such other crafts and classifications of work in which the Producers shall hereafter recognize the International Alliance as the collective bargaining agent of the employees, or in which the International Alliance shall be designated by the National Labor Relations Board as the collective bargaining agent of the employees.

IV. Wage Scales—Hours of Employment — Working Conditions

The wage scales, hours of employment and working conditions applicable to employees in the crafts and classifications of work subject to this agreement shall be those contained in agreements between the Producers on the one hand, and the International Alliance and the respective Locals on the other hand, entered into concurrently herewith or which may hereafter be entered into pursuant to Paragraph I hereof, with respect to such wage scales, hours of employment and working conditions in the crafts and classifications of work described in those agreements.

V. Bargaining Agency

It is hereby agreed between and among the parties hereto that all of the crafts and classifications of

work set forth in the agreements referred to in Paragraphs III and IV hereof constitute during the term of this agreement, an indivisible and integral bargaining unit of which the International Alliance shall, during the term of this agreement, act as and be the collective bargaining agency.

VI. Insignia of International Alliance

The insignia of the International Alliance shall appear on the product of the Producers as it has customarily appeared in the past.

VII. Notices

Any notice required herein shall be deemed sufficient notice as to a Producer, if sent to such Producer at the address indicated opposite its signature, and as to the International Alliance at the address indicated opposite its signature. Any party may change its address at any time by giving written notice of such change to the other parties. All notices required herein shall be deemed sufficient if sent by telegram or registered mail.

VIII. Short Title

This agreement shall be referred to as the Producer-I.A.T.S.E. and M.P.M.O. Basic Agreement of 1944, and shall, as of the date of the execution hereof by all the parties hereto, supersede and replace the Producer-I.A.T.S.E. and M.P.M.O. Basic Agreement of 1939.

INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES AND MOVING
PICTURE MACHINE OPERATORS OF
THE UNITED STATES AND CANADA,

By RICHARD F. WALSH,

630 Fifth Avenue,
New York, New York.

TWENTIETH CENTURY-
FOX FILM CORPORATION,

By W. C. MICHEL,

10201 W. Pico Blvd.,
Los Angeles, Calif.

LOEW'S INCORPORATED,

By N. M. SCHENCK,

Culver City, Calif.

COLUMBIA PICTURES
CORPORATION,

By JACK COHN, V.P.,

1438 N. Gower Street,
Los Angeles, Calif.

PARAMOUNT PICTURES
INC.,

By BARNEY BALABAN,

5451 Marathon,
Los Angeles, Calif.

REPUBLIC PRODUCTIONS,
INC.,

By ALLEN WILSON, V.P.,
4024 Radford Avenue,
North Hollywood, Calif.

R.K.O. RADIO PICTURES,
INC.,

By N. P. RATHVON,
780 Gower Street,
Hollywood, Calif.

UNIVERSAL PICTURES
COMPANY, INC.,

By J. J. O'CONNER, V.P.,
Universal City, Calif.

WARNER BROS. PICTURES,
INC.,

By JOE BERNHARD, V.P.,
Burbank, Calif.

Received Sept. 24, 1946.

RESPONDENT'S EXHIBIT 2

Agreement Between Producers and I.A.T.S.E. &
M.P.M.O. and Local 44 Thereof

This agreement, executed this day of
....., 1944, between,
(hereinafter referred to as the Producer) on the one
hand, and the International Alliance of Theatrical
Stage Employes and Moving Picture Machine Op-
erators of the United States and Canada, and Affili-
ated Property Craftsmen, Local 44, of the Inter-
national Alliance of Theatrical Stage Employes and
Moving Picture Machine Operators of the United
States and Canada (both hereinafter referred to as
the Union), on the other hand, as follows:

1. This agreement is made pursuant to and is
subject to the provisions of the I.A.T.S.E. and
M.P.M.O. Basic Agreement of 1944 excuted concur-
rently herewith.

2. The term of this agreement shall be from Jan-
uary 1, 1944, until December 31, 1948. Either party
may by written notice given on or before July 15,
1945, and on or before July 15, 1947, respectively,
request renegotiation of the "Wage Scales, Hours
of Employment and Working Conditions," attached
hereto and hereinafter referred to as the "Sched-
ule." Such notice shall specify the changes de-
sired in the Schedule. Preliminary negotiations
shall commence promptly after September 1st of
such years and final negotiations shall commence
promptly after the third Monday in October of said

years. The negotiators representing each party on such final negotiations shall have power to execute the agreement reached as the result of such negotiations. The Schedules agreed upon shall be effective as of January 1, 1946, and as of January 1, 1948, as the case may be. The Schedule in effect at the time of the negotiations shall continue during such negotiations, except that in the event such negotiations extend beyond January 1, 1946, and January 1, 1948, as the case may be, the Schedule agreed upon at the conclusion of such negotiations, shall be retroactive to January 1, 1946, and January 1, 1948, respectively.

In addition to the foregoing, if the percentage of wage increases permissible under the "Little Steel Formula" should be increased to 25% or more, on or before December 31, 1944, the Union may reopen the Wage Scale only, by written notice to the Producer on or before January 15, 1945.

3. The attached Schedule, insofar as the same may be legally necessary, shall be submitted for approval to the National War Labor Board, or other governmental agency having jurisdiction in the premises. With respect to those items of the Schedule as require such approval, the parties agree to accept and abide by the determination of the Board or such other governmental agency and such items shall not be enforced until such approval is obtained. If during the term of this agreement any item of the Schedule herein agreed upon or agreed upon pursuant to subsequent renegotiation as herein provided

does not require the approval of the National War Labor Board or other governmental agency, said item shall be enforceable as of the date when such approval is no longer required.

4. The Producer will employ in the crafts and classifications of work described in the Schedule attached hereto only workers who are members in good standing of Local 44, and Local 44 will furnish competent men to perform the work and render the services required by the Producer at such rates and under such such conditions as are herein provided for and in accordance with the provisions of this Agreement.

5. In the event of any dispute between Local 44 or any of its members and the Producer with regard to wages, hours or other conditions of employment or with regard to the interpretation of this agreement, the procedure shall be as follows:

Step One—The Representative of Local Union and the Studio Representative of the Producer shall immediately discuss the matter and the dispute shall be settled if at all possible.

Step Two—In the event of a failure to settle the dispute under Step One, the International Representative of the I.A.T.S.E., and the Hollywood Representative of the Producers who are parties to the I.A.T.S.E. and M.P.M.O. Basic Agreement of 1944 shall immediately discuss the matter and the dispute shall be settled if at all possible.

Step Three—In the event of a failure to settle the dispute under Step Two, the aggrieved party shall deliver to the other party a written statement of the grievance and such grievance shall thereupon be presented to the Producer-I.A.T.S.E. Grievance Committee. Such Committee shall consist of one member designated by the Union and one member designated by the Producers who are parties to the I.A.T.S.E. and M.P.M.O. Basic Agreement of 1944. Such Grievance Committee shall immediately discuss the matter and the dispute shall be settled if at all possible.

Step Four—If such Grievance Committee cannot settle the dispute, an Impartial Chairman shall be selected by the members of the Grievance Committee within five days and such Grievance Committee and the Impartial Chairman shall promptly proceed to hear the matter and settle the dispute. The decision of the Grievance Committee and the Impartial Chairman shall be binding upon the parties hereto and upon the members of the Union. The Grievance Committee and the Impartial Chairman shall have power to interpret and apply the provisions of this agreement, but shall not have power to amend or modify any of its provisions, nor shall they have power to effect a change in any of its provisions. The Grievance Committee and the Impartial Chairman shall not have power to determine jurisdictional disputes between Local 44 and any other Labor organiza-

tion. Fees and expenses of the Impartial Chairman shall be borne equally by the aggrieved Local Union and the Producers.

Any grievance not presented under Step One within thirty days after the occurrence of the subject matter of the grievance shall be deemed to be waived. Time spent on Distant Location shall not be included within this period.

Failure to settle the dispute within ten days after the invocation of Steps One, Two and Three, respectively, entitles either party to proceed to the next step.

6. The crafts and classifications of work described in the Producer-I.A.T.S.E. and M.P.M.O. Basic Agreement of 1944 constitute during the term of this agreement, an indivisible and integral bargaining unit of which the I.A.T.S.E. and M.P.M.O. is the collective bargaining agency and shall continue to be during the term of this agreement.

Studio

By

I.A.T.S.E. & M.P.M.O.

.....

I.A.T.S.E. & M.P.M.O., Local 44,

By

Business Representative.

By

Secretary-Treasurer.

By

President.

Wage Scales, Hours of Employment and Working Conditions

I. Studio Minimum Scale

No.	Classification	Schedule A Daily 6 Hours 1½ After 6 Min. Call 6 Hours*	Studio Rates	
			Schedule B Weekly Guar. 60 Cum. Hrs. 6 Day Week 1½ After 40 Min. Call 8 Hours	Schedule C Weekly "On Call"
		Per Hour	Per Hour	Per Week
T- 1	Prop. and Min. Foreman.....			118.03
T- 2	Prop. and Min. Gang Boss.....	2.05		
T- 3	Prop. and Min. Journeyman....	1.80		
T- 4	Ship Rigger	1.80		
T- 5	Special Effects Foreman.....			118.03
T- 6	Special Effects Gang Boss.....	2.05		
T- 7	Special Effects Journeyman....	1.80		
T- 8	Powder Man Gang Boss.....	2.42		
T- 9	Licensed Powder Man.....	2.10		
T-10	Upholsterer and/or Draper Foreman			111.57
T-11	Upholsterer and/or Draper Gang Boss	1.84		
T-12	Upholster and/or Draper.....	1.61		
T-13	Seamstress Floor Lady	1.15**		
T-14	Seamstress	1.00**		
T-15	Propman Foreman			115.00
T-16	Property Master***	1.71	1.64 (114.80)	
T-17	Asst. Property Master**** ..	1.55	1.49 (104.30)	
T-18	Property Man Gang Boss.....	1.55	1.49 (104.30)	
T-19	Property Man***** (includes Checkers, Hand Propmen, Electrical Propmen, Furni- ture Handlers and Flower Men)	1.51	1.45 (101.50)	
T-20	Greensman Gang Boss.....	1.55	1.49 (104.30)	
T-21	Greensman	1.51	1.45 (101.50)	

- * Minimum call for second shift for "On" Production will be 4 hours instead of 6 hours.
- ** Minimum call for T-13 and T-14 will be 6½ hours instead of 6 hours, 1½ after 6½ hours, ½ hour meal break allowed during minimum call.
- *** Regular Schedule B Property Masters (T-16) will be carried between pictures under this schedule and rate.
- **** Head Flower Man may be employed at T-17 rates and schedules.
- ***** Property Man assigned to Scoring Stage may be employed at T-19 rates and schedules. Special effects on scoring stage carry the T-7 rate.
- T-18 and T-20 are interchangeable job classifications.
- T-19 and T-21 are interchangeable job classifications.

2. Classification and Wage Schedule—Each employee shall be notified at the time of his employment under which classification and wage schedule he is employed. He shall also be notified before any change of classification or wage schedule is effective and such exchange shall not be retroactive.

68.

Seniority

A. The following shall be the basis of establishing Seniority Groups:

(a) All members who were card members prior to September 27, 1942, and all replacements and additions made in accordance with paragraph (c), shall constitute the Senior Group.

(b) All members who become card members after said date shall constitute the Junior Group.

(c) From time to time, but at intervals not to exceed two years, the Union shall make replacements and additions to the Senior Group from the Junior Group in order to maintain an adequate number of competent men in the Senior Group.

B. The Producer shall have freedom of selection within the Senior Group for hiring, filling vacancies and making promotions, and shall not be required to lay off Senior members on any fixed basis.

C. Junior members in any job classification shall be laid off in all cases before any Senior members in such job classification are laid off. Upon request from the Union, a Junior member shall be replaced by a Senior member within a job classification, but

no Junior member need be laid off until he has completed his current assignment.

“Current Assignment” shall be deemed to mean—For Daily employee—the current shift or to complete a rehearsed assignment.

D. The Junior members may be subdivided into groups based on Seniority, but within each such subdivision no individual seniority shall be observed.

Received Sept. 24, 1946.

RESPONDENTS' EXHIBIT No. 3

Affiliated Property Craftsmen—Local Forty-Four
of the International Alliance of Theatrical Stage
Employes and Moving Picture Machine Oper-
tors of the United States and Canada

6472 Santa Monica Boulevard,
Hollywood 38, California.

(Letter)

Mr. Edwin T. Hill, Secretary, Local No. 44,
6472 Santa Monica Boulevard,
Hollywood 38, California.

Dear Sir and Brother:

Many rumors concerning the establishment of picket lines at the Hollywood Studios have reached this office. So that there will be no misunderstanding as to our members honoring these picket lines, this is to notify your local union that before any members of our local unions refuse to go through these picket lines or refuse to render service, you are instructed to contact this office in order to ascertain

if these picket lines are considered legitimate by us.

It must be understood by your local and the membership thereof that the product being produced in these studios bears the label of the I.A.T.S.E. and it is the duty of the General Office to protect that label for the best interests of the entire membership of the Alliance.

With best wishes, I am,

Fraternally yours,

[Seal] /s/ RICHARD F. WALSH,
International President.

(Telegram) March 12, 1945

B. C. "Cappy" DuVal,
Business Representative, Local No. 44,
6472 Santa Monica Boulevard,
Hollywood, Calif.

I have been informed that picket lines have been established around the Hollywood Motion Picture Studios. You are hereby advised that these picket lines are in direct opposition to the best interests of the general membership of the I.A.T.S.E. Therefore instruct your members that they must not in any manner whatsoever violate the Constitution and By-Laws of the International Alliance by refusing to pass through these picket lines or to refuse to render service because of them.

/s/ RICHARD F. WALSH,
International President.

Dear Member:

The above are copies of a letter and a telegram received from our International President, Richard F. Walsh.

EDWIN T. HILL,
Secretary-Treasurer.

Received Sept. 24, 1946.

RESPONDENTS' EXHIBIT No. 4

Badge No.....

Warner Bros. Pictures, Inc.

Off Payroll Notice

Name—Jesse L. Sapp No. 79825
Date—3-19-45 Hour Finished...X...Rate 1.95
Occupation—Prop Maker, Gang Boss
Department—Technical
Remarks—Refused to Do Carpenter Work

All company property has been checked in and payment to employee is hereby authorized.
Storekeeper..... Approved—F. C. Fuhrmann

Received Sept. 24, 1946.

RESPONDENTS' EXHIBIT No. 8

Agreement Between Producers and I.A.T.S.E. and
M.P.M.O. and Local Thereof.

This agreement, executed this day of
....., 1944, between
(hereinafter referred to as the Producer), on the
one hand, and the International Alliance of Theatrical
Stage Employes and Moving Picture Machine
Operators of the United States and Canada, and
..... Local,
of the International Alliance of Theatrical Stage
Employes and Moving Picture Machine Operators
of the United States and Canada (both hereinafter
referred to as the Union), on the other hand, as
follows:

1. This agreement is made pursuant to and is
subject to the provisions of the I.A.T.S.E. and
M.P.M.O. Basic Agreement of 1944, executed con-
currently herewith.

2. The term of this agreement shall be from
January 1, 1944, until December 31, 1948. Either
party may by written notice given on or before July
15, 1945, and on or before July 15, 1947, respec-
tively, request renegotiation of the "Wage Scales,
Hours of Employment and Working Conditions,"
attached hereto and hereinafter referred to as the
"Schedule." Such notice shall specify the changes
desired in the Schedule. Preliminary negotiations
shall commence promptly after September 1st of
such years and final negotiations shall commence

promptly after the third Monday in October of said years. The negotiators representing each party on such final negotiations shall have power to execute the agreement reached as the result of such negotiations. The Schedules agreed upon shall be effective as of January 1, 1946, and as of January 1, 1948, as the case may be. The Schedule in effect at the time of the negotiations shall continue during such negotiations, except that in the event such negotiations extend beyond January 1, 1946, and January 1, 1948, as the case may be, the Schedule agreed upon at the conclusion of such negotiations, shall be retroactive to January 1, 1946, and January 1, 1948, respectively.

In addition to the foregoing, if the percentage of wage increases permissible under the "Little Steel Formula" should be increased to 25% or more, on or before December 31, 1944, the Union may reopen the Wage Scale only, by written notice to the Producer on or before January 15, 1945.

* * *

4. The Producer will employ in the crafts and classifications of work described in the Schedule attached hereto only workers who are members in good standing of Local, and Local will furnish competent men to perform the work and render the services required by the Producer at such rates and under such conditions as are herein provided for and in accordance with the provisions of this Agreement.

* * *

Received Sept. 10, 1946.

RESPONDENTS' EXHIBIT NO. 9

April 14, 1944.

Wage Scales, Hours of Employment and Working Conditions

1. I. Studio Minimum Wage Scale

"V" I.A.T.S.E. Laborers Studio Local No. 727		Studio Rates	
		Schedule A	Schedule C
No.	Classification	Daily 6 hours 1½ after 6 Min. call 6 hours	Weekly "On Call"
		Per Hour	Per Week
V-1	Labor Foreman		69.30
V-2	Labor Gang Boss	1.31	
V-3	Laborer*	1.05	

* Any laborer regularly assigned as tool room keeper shall receive a bonus of 15%.

* * *

Received Oct. 7, 1946.

RESPONDENTS' EXHIBIT NO. 10

April 14, 1944.

Wage Scales, Hours of Employment and Working Conditions

1. I. Studio Minimum Wage Scale

		Studio Rates		
		Schedule A	Schedule B	Schedule C
"R" I.A.T.S.E. Lamp Operators Local No. 728	Daily	Weekly Guar.		
	6 Hours	60 Cum. Hrs.		
	1½ After 6	6 Day Week		
	Min. Call	1½ After 40		
	6 Hours*	Min. Call		
		8 Hours		
		Weekly		
		"On Call"		
No.	Classification	Per Hour	Per Hour	Per Week
R-1	General Foreman.....			118.03
R-2	Chief Set Electrician..	2.18	2.14**	
R-3	Chief Rigging Electrician	1.80	1.72	
R-4	Special Operator*** and/or Gang Boss..	1.80		
R-5	Ass't Chief Set Electrician	1.71	1.64	
R-6	Lamp Operator	1.53		

* Minimum call for second shift "on production" will be 4 hours instead of 6 hours.

** Regular Schedule B Chief Set Electricians (R-2) will be carried between pictures under this schedule and rate.

*** Special Operator's Rate will be paid for: 1. Wind Machine. 2. Dimmer Effects. 3. Lightning. 4. Fixtures. 5. Neon. 6. Effect Spot Follow Shots. 7. Gaffing Still Set-ups off shooting set.

* * *

Received Oct. 7, 1946.

RESPONDENTS' EXHIBIT NO. 11

April 14, 1944.

Wage Scales, Hours of Employment and Working Conditions

1. I. Studio Minimum Wage Scale

		Studio Rates		
		Schedule A	Schedule B	Schedule C
"Q"	I.A.T.S.E. Grips	Daily	Weekly Guar.	
	Local No. 80	6 Hours	60 Cum. Hrs.	
		1½ After 6	6 Day Week	Weekly
		Min. Call	1½ After 40	"On Call"
		6 Hours*	Min. Call	
			8 Hours	
No.	Classification	Per Hour	Per Hour	Per Week
Q-1	Head Grip Foreman**			140.00
Q-2	Grip Foreman			118.03
Q-3	Grip Rigger Gang Boss and/or Bombazine Gang Boss	2.05		
Q-4	Grip Rigger, Back Stage Rigger, Bombazine man, and/or Head Crane operator	1.80		
Q-5	Grip Gang Boss and/or Scene Deck Boss....	1.86		
Q-6	Grip and/or Sewing Machine Oper.	1.63		
Q-7	1st Co. Grip	2.05	1.97 (137.90)***	
Q-8	2nd Co. Grip	1.71	1.64 (114.80)	

* Minimum call for second shift "on production" will be 4 hours instead of 6 hours.

** The Head Grip Foreman shall be in charge of the Grip Department, and he shall be under the supervision of the Construction Superintendent, or other studio designated representative.

*** Regular Schedule B, 1st Co. Grips (Q-7) will be carried between pictures under this schedule and rate.

Received Oct. 10, 1946.

* * * *

RESPONDENTS' EXHIBIT NO. 13

Prop Makers Called Between October 31, 1945, and September 14, 1946
Called Directly or Returned After Leave of Absence

Name	On	Off	On	Off	On	Off
R. Dobb Sr. (S.L.)		8- 4-45	11-12-45			
J. Faggard (Vet.)		9-10-46	9-30-46			
H. O. Galley (L.A.)	4- 3-46	11-19-45	1- 7-46	8-13-46	9-16-46	
H. N. Mullan (L.A.)		3-23-45	11-12-45			
G. Schnell		3-19-45	9-10-45	10-13-45	11- 3-45	11- 9-45
Harold R. Horner		3-19-45	9-10-45	10-13-45	11- 3-45	1-12-46
Lewis L. Beamer (S.L.)	4-26-46	8-13-46				
R. Eggenweiler (S.L.)	4- 6-45	10-13-45	1- 2-46	6-28-46		
Clyde G. Pollard (L.A.)	4-12-45	9- 8-45	9-29-45	11-30-45	12-12-45	12-29-45
	4- 3-46					
Carl G. Davis (Vac.)		11-16-45	11-28-45			
Donald Hampton (Vet.)	9- 8-45					
J. A. Larson (Vet.)	11- 5-45					
	11- 7-45					
Herman Townsley (Vac.)	3-30-45	11- 3-45	11-13-45			
Frank Brendel (Vet.)	11- 6-45					
James A. Moreland (Vet.)	1-17-46					
Fred Reese (S.L.)		11-24-45	1- 8-46			
Arthur S. Rhoades (Vet.)						
John S. Baker (S.L.)	4- 1-46	12-21-45	1- 2-46			
L. C. Beamer (S.L.)		11- 2-45	2- 4-46			
Herbert E. Cheek (Vet.)		3-31-44	1-21-46	7- 8-46	8-20-46	
Curt J. Hager (Vac.)	7- 2-45	12-23-45	1- 2-46			
John A. Stafford (Vac.)		12-22-45	1- 3-46			

Received Oct. 9, 1946.

RESPONDENTS' EXHIBIT NO. 14

Prop Makers Called Between October 31, 1945, and September 14, 1946
Called Through Local 44

Name	Off	On	Off	On	Off	On
B. G. Alsdorf	3- 8-45	11-12-45	6-17-46			
James L. Bannister		4-23-46	7-18-46			
Clyde C. Bowman		4-26-45	7-18-46			
Vincent C. Bruno		3-18-46	7-20-46	8- 2-46	8-13-46	
Oran N. Bush		4-26-45	7-12-46			
Richard M. Burr		3-18-46	7-18-46			
Merle E. Browne		5- 4-45	12-29-45	3-27-45	7-17-45	
Ferrel A. Coe		6- 6-46	7-18-46			
John J. Conklin		3-25-45	7-17-46			
Allan Chapnick		6- 6-46	8-13-46			
Lytleton Dryden		6- 4-46	6- 8-46			
Michael De Genner		4- 3-46	5-31-46	7-10-46	8-13-46	
John Edwards		3-25-46	7-17-46			
Charles Fetterhoff		4-26-45	7-18-46			
James Gegan		4-25-46	4-25-46			
O. B. Godwin		9-19-45	12-29-45	3-27-46	8-13-46	
Daniel W. Hays		4- 3-46	7-17-46			
Edwin LeRoy		5- 9-46	8-13-46			
Valmore C. Little		4-24-46	7-18-46			
Byron McMurray		10-11-45	12-29-45	4-26-46	7-17-46	9- 5-46
Herman Marks		9-19-45	12-29-45	4-23-46	7-18-46	
Kenneth L. Meehan		2-20-46	8-13-46			
Anthon Nielsen	12-23-44	6- 6-46	8-13-46			

Name	Off	On	Off	On	Off	On
Stanley Olexiewicz	10-29-44	6- 6-46	8-13-46			
John F. Overbeck	2-21-45	4- 3-46	4-11-46			
Cyrus F. Peavler		4-24-46	7-17-46			
Pete Petersen		4-24-46	8-13-46			
James M. Pollard		6- 1-46	7-17-46			
Harold Rogers	3-19-45	2-12-46	2-14-46			
Robert Reynolds		5- 6-46	7-17-46			
Robert Sanfern		6- 6-46	7-18-46			
Albert K. Schultz		4-26-46	5- 8-46			
Anthony Seiler		4-24-46	8-12-46			
John Sharwatz	4-26-46	7-18-46				
Earl Sherman		6- 6-46	8-13-46			
George Spangler		3-19-46	8-13-46			
Isaac V. Steenberger	10-21-44	3-27-46	2- 6-46			
Ira R. Stringer		4-10-45	11- 3-45	11-15-45	12-29-45	
R. L. Sturm	11-18-44	2-12-46	4-23-46			
Hubert J. Tomlinson	12-29-45	3-26-46	3-30-46			
George J. Turney		9-24-45	10-13-45	10-29-45	12-24-45	9-14-46
J. Van Kesteren	10-31-45	3-18-46	8-13-46			
Paul Wells	12-29-45	4-23-46	8-13-46			
Walter Wells		5-21-46	6-17-46			
William R. Williams		2- 4-46	6- 1-46			
Joseph Zadravetz	3- 2-45	3-29-46	8-13-46			
Paul De Sanetis	3-19-45	11- 7-45				
Robert A. Lee		3-18-46	4-17-46	4-26-46		
Roy Borg		1-21-46	6-29-46	7-15-46		

Name	Off	On	Off	On	Off	On
William B. Goodwin		10-17-45		12-29-45		3- 7-46
Frank Kelley, Jr.		4- 3-46				
Ival E. Kidwell		2-11-46				
Paul B. Lunsford	3-13-44	6-14-46				
Donald MacKellar	3-19-46	8- 5-46				
Angelo J. Martinelli		8-21-45		12-29-45		2-25-46
W. R. Criswell		9- 5-46		9-26-46		
B. J. Colville		9-14-46		9-14-46		
E. W. Gregory		9-14-46				
J. W. Johnson		9- 5-46		10- 1-46—	Transferred to Art Dept.	
E. S. Kowal		9- 9-46				
N. Massion		9-14-46				
G. Schnell		9- 3-46		9-25-46		

Received Oct. 9, 1946.

I.A.T.S.E. EXHIBIT No. 1

(Letterhead)

International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, International Building, 630 Fifth Ave., New York 20, N. Y.

New York 20, N. Y.,

March 19, 1945

To All Members of I.A.T.S.E. Studio Locals:

This is to officially advise you that until the end of the emergency, created by the unauthorized strike of Painters Union, No. 1421, members of I.A.T.S.E. Studio Locals are not to observe any trade jurisdictional lines in the studios.

This letter, however, is not to be considered an authorization for any member to work in the jurisdiction of any Local Union whose members are observing their no-strike pledge, and are fulfilling their contractual obligations in the studios.

Yours fraternally,

[Seal] /s/ RICHARD F. WALSH,
International President.

Received Oct. 9, 1946.

I.A.T.S.E. EXHIBIT No. 9

Charter

International Alliance of Theatrical Stage Employes
and Moving Picture Machine Operators of the
United States and Canada

To Whom It May Convern:

Whereas, A petition has been received from B. C. DuVal, Joseph P. Busch, Philip C. Swartout, A. B. Standard, D. R. Crawford, Paul B. Widlieska, Nick Kaltenstadler, Wm. L. Waite, W. E. Carruthers, Theo. J. Hansard, Mansfield M. Moyer, Don Dinwiddie, F. V. Lindsay, S. M. Baker, James C. Ritchey, Oscar G. Lau, Arthur J. Camp, Wm. Mittlestedt, L. A. Gwynne, S. D. Nicoloff praying that a charter be granted for the formation of a branch of the International Alliance of Theatrical Stage Employes and Moving Picture Operators of the United States and Canada, to be located in the City of Hollywood, County of Los Angeles, State of California.

Know ye, that acting under the authority vested in us by the Constitution and By-Laws of the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada, we desire and cause this charter to be issued for the institution of a local union to be known as Motion Picture Studio Property-men, Swing Gang Men, Nurserymen, Set Dressers, Prop-makers, Prop-Miniature, Upholsterers, Drapers and Special Effects Men Local No. 44, and bear date and by virtue of this charter to

do and perform such acts as are prescribed in the Constitution and Laws of the International Alliance of Theatrical Stage Employes and Moving Picture Operators of the United States and Canada.

The International Alliance hereby declares its right to suspend or revoke this charter for any neglect or refusal to perform the duties required by its Constitutions and Laws, and should the aforesaid Local Union be dissolved or forfeit this charter, then all property, books, papers and moneys of the International Alliance shall be transferred to the General Office of International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of United States and Canada, and furthermore in consideration of the due performance of the above, the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada does hereby bind itself to support the aforesaid Local Union in exercise of all its rights and privileges as such.

In Witness Whereof, we have ordered the seal of the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada to be affixed hereto this fifteenth day of May, A.D. One Thousand Nine Hundred and Thirty Nine.

[Seal]

GEO. E. BROWNE,

International President.

LOUIS KROUSE,

General Secretary-Treasurer.

Received Oct. 10, 1946.

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

COLUMBIA PICTURES CORPORATION,
WARNER BROS. PICTURES, INC., and
LOEW'S INCORPORATED,
Respondents.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 203.87, Rules and Regulations of the National Labor Relations Board, Series 5, as amended (redesignated Section 102.87, 14 F. R. 78), hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled "In the Matter of Columbia Pictures Corporation and Association of Motion Picture Producers, Inc., and Joseph Cuccia, Case No. 21-C-2505"; "In the Matter of Columbia Pictures Corporation and Association of Motion Picture Producers, Inc., and Irwin P. Hentschel, Case No. 21-C-2562"; "In the Matter of Republic Productions, Inc., and Association of Motion Picture Producers, Inc., and Robert Ames, Case No. 21-C-2563"; "In the Matter of Warner Bros. Pictures, Inc., and Association of Motion Picture Producers, Inc., and L. G. Batchelder, Paul

De Sanctis, Carl H. Gidlund, G. M. Hand, Chas. Jensen, Leo Lamb, R. M. Lora, H. C. MacDonald, Don MacKellar, W. J. Simpson, George Stoica, Robert Bonning, W. G. White, Jesse L. Sapp, J. C. Goudie, Chas. J. Larson, Fred Seward, B. Kenneth Coffey and Willis Howe, Case No. 21-C-2564"; "In the Matter of Warner Bros. Pictures, Inc., and Association of Motion Picture Producers, Inc., and J. Harold Rogers, Case No. 21-C-2660"; "In the Matter of Loew's Incorporated and Association of Motion Picture Producers, Inc., and George I. Groth and Robert L. Selgrath, Case No. 21-C-2662"; "In the Matter of Twentieth Century-Fox Film Corporation and Association of Motion Picture Producers, Inc., and Eugene V. Mailes, Case No. 21-C-2664"; and "In the Matter of RKO Radio Pictures, Inc., and Association of Motion Picture Producers, Inc., and Forrest McLoney, Case No. 21-C-2665"; such transcript including the pleadings and testimony and evidence upon which the order of the Board in said consolidated proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating Mortimer Riemer Trial Examiner for the National Labor Relations Board, dated September 3, 1946.

(2) Stenographic transcript of testimony taken before Trial Examiner Riemer on September 16, 24, 25, and 30, 1946; and on October 1 to 4 and 7 to 10,

1946, inclusive, together with all exhibits introduced in evidence, also all rejected exhibits.

(3) Respondents' telegram, dated October 24, 1946, requesting an extension of time in which to file brief with the Trial Examiner.

(4) Copy of Chief Trial Examiner's telegram, dated October 24, 1946, granting all parties an extension of time in which to file briefs.

(5) Intervenor's telegram, dated November 25, 1946, requesting an extension of time in which to file brief with the Trial Examiner.

(6) Copy of acting Chief Trial Examiner's telegram, dated November 26, 1946, granting all parties an extension of time in which to file briefs.

(7) Copy of Trial Examiner Riemer's Intermediate Report, dated March 20, 1947 (annexed to item 25 hereof); order transferring cases to the Board, dated March 28, 1947, together with affidavit of service and United States Post Office return receipts thereof.

(8) Intervenor's letter, dated April 2, 1947, requesting an extension of time in which to file exceptions and brief and also requesting permission to argue orally before the Board.

(9) Respondents' letter dated April 3, 1947, requesting an extension of time in which to file exceptions and brief and also requesting permission to argue orally before the Board.

(10) Copy of Board's telegram, dated April 8, 1947, granting all parties an extension of time in which to file exceptions and briefs.

(11) Intervenor's letter, dated May 7, 1947, re-

questing further extension of time in which to file brief.

(12) Copies of Board's telegrams, dated May 14, 1947, granting all parties further extension of time in which to file briefs.

(13) Respondents' telegram, dated May 14, 1947, requesting further extension of time in which to file exceptions to the Intermediate Report.

(14) Copies of Board's telegram, dated May 15, 1947, granting all parties further extension of time in which to file exceptions.

(15) Letter, dated May 15, 1947, from counsel for certain complainants, objecting to the extension of time granted by the Board on May 15, 1947.

(16) Copy of Board's letter to the counsel for certain complainants, dated May 20, 1947, sustaining the Board's action in granting an extension of time in which to file briefs and exceptions to July 15, 1947.

(17) Exceptions to the Intermediate Report, dated July 11, 1947, filed on behalf of certain complainants.

(18) Respondents' exceptions to the Intermediate Report, dated July 14, 1947.

(19) Intervenor's exceptions to the Intermediate Report, dated January 8, 1948.

(20) Letter from attorney for certain complainants, dated December 22, 1947, requesting permission to argue orally before the Board.

(21) Additional exceptions to the Intermediate Report by Robert N. Benning and William J. Simp-

son, individual complainants, dated January 8, 1948, and February 26, 1948, respectively.

(22) Copy of notice of hearing for the purpose of oral argument before the Board, dated June 14, 1948, together with affidavit of service and United States Post Office return receipts thereof.

(23) Copy of notice of postponement of oral argument before the Board, dated June 17, 1948, together with affidavit of service and United States Post Office return receipts thereof.

(24) List of appearances at oral argument held before the Board on July 13, 1948.

(25) Copy of Decision and Order issued by the National Labor Relations Board on March 31, 1949, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

(26) Petition of certain complainants for reconsideration and modification of Decision and Order, or in the alternative for reopening to admit further evidence, dated April 27, 1949.

(27) Copy of affidavit of Ben Margolis in support of complainants' petition for reconsideration, sworn to April 27, 1949.

(28) Respondents' reply to petition for reconsideration, received May 16, 1949.

(29) Intervenor's reply to petition for reconsideration, received May 12, 1949.

(30) Closing memorandum of certain complainants on petition for reconsideration, etc., dated May 17, 1949.

(31) Intervenor's letter, dated May 18, 1949, re-

questing that complainants' closing memorandum on petition for reconsideration be stricken.

(32) Copy of Board's order denying complainants' petition for reconsideration, dated July 1, 1949, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 2nd day of June, 1950.

[Seal] /s/ FRANK M. KLEILER,
 Executive Secretary,
 National Labor Relations
 Board.

[Endorsed]. No. 12568. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Warner Bros. Pictures, Inc., Columbia Pictures Corporation and Loew's Incorporated, Respondent. Transcript of Record. Petition for Enforcement of Order of the National Labor Relations Board.

Filed June 6, 1950.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In The United States Court of Appeals
for the Ninth Circuit

No. 12568

NATIONAL LABOR RELATIONS BOARD,
Petitioner.

vs.

COLUMBIA PICTURES CORPORATION,
WARNER BROS. PICTURES, INC., and
LOEW'S INCORPORATED,
Respondents.

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RE-
LATIONS BOARD.

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondents, Columbia Pictures Corporation, Los Angeles, California, Warner Bros. Pictures, Inc., Burbank, California, and Loew's Incorporated, Culver City, California, and their respective officers, agents, successors, and assigns. The consolidated proceeding resulting in said order is known upon the records of the Board as "In the Matter of Columbia Pictures Corporation and Association of Motion Picture Producers, Inc. and

Joseph Cuccia, Case No. 21-C-2505;” “In the Matter of Columbia Pictures Corporation and Association of Motion Picture Producers, Inc. and Irwin P. Hentschel, Case No. 21-C-2562;” “In the Matter of Republic Productions, Inc., and Association of Motion Picture Producers, Inc. and Robert Ames, Case No. 21-C-2563;” “In the Matter of Warner Bros. Pictures, Inc. and Association of Motion Picture Producers, Inc. and L. G. Batchelder, Paul De Sanctis, Carl H. Gidlund, G. M. Hand, Chas. Jensen, Leo Lamb, R. M. Lora, H. C. MacDonald, Don MacKellar, W. J. Simpson, George Stoica, Robert Bonning, W. G. White, Jesse L. Sapp, J. C. Goudie, Chas. J. Larson, Fred Seward, B. Kenneth Coffey and Willis Howe, Case No. 21-C-2564;” “In the Matter of Warner Bros. Pictures, Inc. and Association of Motion Picture Producers, Inc. and J. Harold Rogers, Case No. 21-C-2660;” “In the Matter of Loew’s Incorporated and Association of Motion Picture Producers, Inc. and George I. Groth and Robert L. Selgrath, Case No. 21-C-2662;” “In the Matter of Twentieth Century-Fox Film Corporation and Association of Motion Picture Producers, Inc. and Eugene V. Mailes, Case No. 21-C-2664;” “In the Matter of RKO Radio Pictures, Inc. and Association of Motion Picture Producers, Inc. and Forrest McLoney, 21-C-2665.”

In support of this petition the Board respectfully shows:

(1) Respondents are engaged in business in the State of California, within this judicial circuit

where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on March 31, 1949, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondents and their respective officers, agents, successors, and assigns. So much of the aforesaid order as relates to this proceeding provides as follows:

ORDER

Upon the entire record in the case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondents Warner Bros. Pictures, Inc., Burbank, California, Columbia Pictures Corporation, Los Angeles, California, and Loew's Incorporated, Culver City, California, and their respective officers, agents, successors, and assigns, shall:

1. Cease and desist from interfering with, restraining, or coercing their employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or pro-

tection, or to refrain from any and all of such activities except to the extent that such right may be affected by agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3) of the Act, as guaranteed in Section 7 of the Act, by discharging or refusing to reinstate any of their employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of their employment, because of their participation in concerted activities for their mutual aid or protection, or by any like or related conduct.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Respondent Warner Bros. Pictures, Inc., Burbank, California, and its officers, agents, successors, and assigns, shall:

(1) Offer Kenneth B. Coffey, Paul De Sanctis, John G. Goudie, Willis F. Howe, Charles J. Larson, Fred Seward, William J. Simpson, and William G. White immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges;

(2) Make whole Lynn George Batchelder, Robert N. Bonning, Kenneth B. Coffey, Paul De Sanctis, Carl H. Gidlund, George M. Hand, Willis F. Howe, Charles Jensen, Leo Leonard Lamb, Raymond M. Lora, Donald MacKellar, J. Harold Rogers, Jesse L. Sapp, Fred Seward, William J. Simpson,

Paul L. Stanley, George Stoica, Jr., and William G. White for any loss of pay they may have suffered by reason of Respondent Warner's discrimination against them, in the manner set forth in "The Remedy," herein.

(b) Respondent Columbia Pictures Corporation, Los Angeles, California, and its officers, agents, successors and assigns, shall:

(1) Offer Joseph P. Cuccia immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority and other rights and privileges;

(2) Make whole Joseph P. Cuccia and Irwin P. Hentschel for any loss of pay they may have suffered by reason of Respondent Columbia's discrimination against them, in the manner set forth in "The Remedy," herein.

(c) Respondent Loew's, Incorporated, Culver City, California, and its officers, agents, successors, and assigns, shall:

(1) Offer John L. Selgrath immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority and other rights and privileges;

(2) Make whole George I. Groth and John L. Selgrath for any loss of pay they may have suffered by reason of Respondent Loew's discrimination against them, in the manner set forth in "The Remedy," herein.

(d) Post in conspicuous places throughout their

respective studios copies of the notices attached hereto marked Appendices A, B, and C.⁶² Copies of said notices, to be furnished by the Regional Director for the Twenty-first Region, shall, after being signed by representatives of the respective Respondents, be posted by the respective Respondents immediately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days from the date of this Order, what steps each of them has taken to comply herewith.

⁶²Respondent Warner shall sign and post copies of Appendix A, Respondent Columbia shall sign and post copies of Appendix B, and Respondent Loew's shall sign and post copies of Appendix C. In the event that this Order is enforced by decree of a United States Court of Appeals, there shall be inserted in the respective notices, before the words, "A Decision and Order," the words "Decree of the United States Court of Appeals Enforcing."

(3) On March 31, 1949, the Board's Decision and Order was served upon Respondents by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondents' counsel.

(4) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the consolidated proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring Respondents, and their respective officers, agents, successors, and assigns, to comply therewith.

Dated at Washington, D. C., this 2nd day of June, 1950.

NATIONAL LABOR RELATIONS BOARD,

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

Appendix A

Notice to All Employees Pursuant to
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in con-

certed activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act, as guaranteed by Section 7 thereof, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of their employment, because of their participation in concerted activities for their mutual aid or protection, or by any like or related conduct.

We will offer to the employees named below, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed.

Kenneth B. Coffey
Paul De Sanctis
John G. Goudie
Willis F. Howe

Charles J. Larson
Fred Seward
William J. Simpson
William G. White

We will make the following employees whole for any loss of pay suffered as a result of the discrimination against them, in accordance with the Order of the National Labor Relations Board.

Lynn George Batchelder	Donald MacKellar
Robert N. Bonning	Jesse L. Sapp
Paul De Sanctis	J. Harold Rogers
Kenneth B. Coffey	Carl H. Gidlund
Raymond M. Lora	George M. Hand

Willis F. Howe
 Charles Jensen
 Leo Leonard Lamb
 Fred Seward

William J. Simpson
 Paul L. Stanley
 George Stoica, Jr.
 William G. White

WARNER BROS. PICTURES,
 INC.

(Employer)

Dated.....

By

(Representative) (Title)

This notice must remain posted for 60 days from the date thereof, and must not be altered, defaced, or covered by any other material.

Appendix B

Notice to All Employees Pursuant to
 A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a)

(3) of the Act, as guaranteed by Section 7 thereof, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of their employment, because of their participation in concerted activities for their mutual aid or protection, or by any like or related conduct.

We will offer to the employee named below, immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed.

Joseph P. Cuccia

We will make the following employees whole for any loss of pay suffered as a result of the discrimination against them, in accordance with the Order of the National Labor Relations Board.

Joseph P. Cuccia

Irwin P. Hentschel

COLUMBIA PICTURES CORPORATION,
(Employer).

Dated.....

.. By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Appendix C

Notice to All Employees Pursuant to
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3) of the Act, as guaranteed by Section 7 thereof, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of their employment, because of their participation in concerted activities for their mutual aid or protection, or by any like or related conduct.

We will offer to the employee named below, immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed.

John L. Selgrath

We will make the following employees whole for any loss of pay suffered as a result of the discrimination against them, in accordance with the Order of the National Labor Relations Board.

George I. Groth

John L. Selgrath

LOEW'S INCORPORATED
(Employer)

Dated.....

By

(Representative) (Title)

This notice must remain posted for 60 days from the date thereof, and must not be altered, defaced, or covered by any other material.

[Endorsed]: Filed June 6, 1950.

United States of America—ss.

The President of the United States of America

To: Columbia Pictures Corp., 1438 N. Gower St., Los Angeles, Cal.; Warner Bros. Pictures, Inc. 4000 West Olive Ave., Burbank, Cal.; Loew's Inc., 10202 Washington Blvd., Culver City, Cal.; Ass'n of Motion Picture Producers, Inc., 5504 Hollywood Blvd., Los Angeles, Cal.; and Int. Ass'n of Machinists, Lodge No. 1185, 1627 N. Cahuenga Blvd., Hollywood, Cal.

Greeting:

Pursuant to the provisions of Subdivisions (e) of

Section 160, U. S. C. A. Title 29 (National Labor Relations Board Act, Section 10 (e)), you and each of you are hereby notified that on the 6th day of June, 1950 a petition of the National Labor Relations Board for enforcement of its order entered on March 31, 1950, in a proceeding known upon the records of the said Board as

“In the Matters of Columbia Pictures Corporation, et al., Case Nos. 21-C-2505 and 21-C-2562; Warner Bros. Pictures, Inc., et al., Case Nos. 21-C-2564 and 21-C-2660 and Loew's Incorporated, et al., Case No. 21-C-2662,

and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 6th day of June in the year of our Lord one thousand, nine hundred and fifty.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

[Endorsed]: Filed June 19, 1950.

[Title of Court Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCE-
MENT OF ORDER OF THE NATIONAL
LABOR RELATIONS BOARD.

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

Respondents Columbia Pictures Corporation,
Warner Bros. Pictures, Inc. and Loew's Incorporated,
for answer to the petition for enforcement
of an order of the National Labor Relations Board
in the above entitled proceeding admit and allege
as follows:

1. Admit the allegations of Paragraph 1 of said
petition.

2. Admit the allegations of Paragraph 2 of said
petition, except allege that they are without knowl-
edge sufficient to form a belief as to the truth of the
allegation that the Board has filed with the Court
the entire record of the proceedings before the
Board.

3. Admit the allegations of Paragraph 3 of said
petition.

4. Allege that they are without knowledge suf-
ficient to form a belief as to the truth of the al-
legations of Paragraph 4 of said petition.

5. Allege that the Board's order is based upon
an erroneous construction of the National Labor
Relations Act and is therefore not authorized by the
provisions of said Act.

6. Allege that the Board's order requires reinstatement of and payment of back pay to individuals as employees who have been discharged for cause and is therefore not authorized by the provisions of said Act.

7. Allege that the Board's order requires reinstatement of and payment of back pay to individuals who failed to file charges with the Board and is therefore not authorized by the provisions of said Act.

8. Allege that the Board's order is based upon an erroneous interpretation of Board's Exhibit No. 8, being the agreement between the Executive Council of the American Federation of Labor, the unions involved in the jurisdictional dispute in the motion picture industry which is the subject matter of this proceeding, and the major motion picture companies, including respondents.

9. Allege that the Board erred in ordering the reinstatement of and the payment of back pay to individuals who, under the uncontradicted evidence, were engaged in concerted activities not protected by the Act.

10. Allege that the Board's order is based upon findings of fact which are not supported by substantial evidence on the record considered as a whole.

11. Allege that the Board's order is based upon findings of fact which omit and are contrary to uncontradicted evidence.

12. Allege that the Board erred in failing to order deducted from its awards of back pay the losses in earnings which were wilfully incurred by individuals who failed to make a reasonable effort to find work.

Wherefore, respondents pray that the petition of the National Labor Relations Board in the above entitled proceeding be dismissed.

O'MELVENY & MYERS,

/s/ HOMER I. MITCHELL,

/s/ WILLIAM W. ALSUP,

Attorneys for Respondents.

Dated: June 22, 1950.

[Endorsed]: Filed June 23, 1950.

[Title of Court Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON
BY THE BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, the petitioner herein, and, in conformity with Rule 19 (6) of the rules of this Court, files this statement of points upon which it intends to rely in the above-entitled proceeding:

1. Substantial evidence supports the Board's findings that respondents by discriminatorily denying reinstatement to certain employees, because of their participation in concerted activities, have engaged in unfair labor practices within the meaning of Section 8 (1) of the Act.

2. The Board's order requiring respondent to reinstate and make whole certain employees and to pay back pay to other employees is valid and proper.

Dated at Washington, D. C., this 2nd day of June, 1950.

/s/ A. NORMAN SOMERS,
Assistant General Counsel,
National Labor Relations
Board.

No. 12568

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WARNER BROS. PICTURES, INC., COLUMBIA PICTURES
CORPORATION AND LOEW'S INCORPORATED, RESPOND-
ENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
FREDERICK U. REEL,
HARVEY B. DIAMOND,
Attorneys,
National Labor Relations Board.

FILED

OCT - 2 1950

PAUL P. O'BRIEN,
CLERK

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In the United States Court of Appeals for the Ninth Circuit

No. 12568

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WARNER BROS. PICTURES, INC., COLUMBIA PICTURES
CORPORATION AND LOEW'S INCORPORATED, RESPOND-
ENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This proceeding is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against respondents on March 31, 1949 (82 N. L. R. B. 568; R. 40-52), pursuant to Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. III, Sec. 151, *et seq.*),¹ herein called the Act. This Court has juris-

¹ All proceedings had prior to the date of issuance of the Board's decision and order were pursuant to the provisions of the original Act (49 Stat. 449, 29 U. S. C. Sec. 151, *et seq.*). The Board found that respondents had violated Section 8 (1) of the original Act, and the language of this section was continued without change as Section 8 (a) (1) of the amended Act. Relevant portions of the original and amended Acts appear in the Appendix, *infra*, pp. 32-36.

diction under Section 10 (e) of the Act, the unfair labor practices having been committed at respondents' studios in Los Angeles, California. Respondents concede that they are engaged in interstate commerce within the meaning of the Act, and no question as to the Board's jurisdiction is presented (R. 66-68; 198-199, 712-714, 719-720).²

STATEMENT OF THE CASE

Upon charges filed by individual complainants³ the Board issued its complaint (R. 57-60; 711-718), alleging that respondents (hereinafter individually called Warner, Columbia, and Loew's, respectively) had discriminated against certain employees because they had engaged in concerted activities. Following the usual hearing the Board issued its decision (R. 1-40) finding that respondents had violated Section 8 (1) of the Act by discriminatorily denying employment to the complainants, and ordered respondents to cease and desist from the unfair labor practices found, to reinstate

² Wherever in a series of record references a semicolon appears, references preceding the semicolon are to the Board's findings; others which follow are to the supporting evidence.

³ Charges were filed against Warner Bros. Pictures, Inc., on behalf of employees Batchelder, De Sanctis, Gidlund, Hand, Jensen, Lamb, Lora, MacKellar, Simpson, Stoica, Bonning, White, Sapp, Larson, Rogers, and Goudie; against Columbia Pictures Corporation for employees Hentschel and Cuccia; and against Loew's Incorporated for employees Selgrath and Groth. Similar charges filed on behalf of other employees, and against other motion picture studios were dismissed by the Board (R. 20-24, 54-58; 711). The Board's complaint also named as discriminatees Seward, Howe, Coffey, and Stanley (R. 715-716), as to whom respondents contended no charge was filed. See *infra*, pp. 29-30.

and make whole some of the discriminatees, and to pay back-pay to the others (R. 40-46).⁴

I. The Board's findings and conclusions

A. Background of events preceding the strike of March 12, 1945

Respondents operate three of the ten largest motion picture studios in Hollywood. Their many thousands of employees are organized into numerous professional and labor organizations. In order to maintain a uniform bargaining position the ten major producers in Hollywood, including the respondents, had set up a Producers Labor Committee (R. 72-73; 523-527). The members of the Committee were executives of the producers, and the Committee represented the studios in their negotiations with the various labor organizations representing employees (*ibid.*) The Committee in turn appointed Fred E. Pelton as the Producers Labor Administrator, and it was Pelton's duty to meet with employee representatives, and to transmit to the producers and the unions the directives and decisions of the Committee (R. 73; 523-525, 529-532).

International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of

⁴The Association of Motion Picture Producers, Inc., was also found to have engaged in unfair labor practices and the Board ordered the Association to cease and desist from such practices and to post appropriate notices (R. 6, 40, 44-45). However, since the Association has fully complied with a similar order issued on September 7, 1948, in a companion case, *Association of Motion Picture Producers, Inc., et al.*, 79 N. L. R. B. 466, the Board is not seeking enforcement of that portion of its order directed against the Association, inasmuch as an enforcement decree against it would merely require duplication of the compliance action already taken.

the United States and Canada, hereinafter called IATSE (R. 202-203), is an industrial type union affiliated with the American Federation of Labor, with eleven locals in the Hollywood motion picture industry (R. 71, 76; 660, 749-750). Only four locals, Affiliated Property Craftsmen, Local No. 44; Motion Picture Studio Grips, Local No. 80; Motion Picture Studio Laborers and Utility Workers, Local No. 727; and Studio Electrical Technicians, Local No. 728, are here involved, because of the membership of the complainants in such locals (R. 76, n. 11; 205, 391-392, 349, 466).⁵ Respondents have had bargaining contracts with IATSE covering the employees represented by that union for many years, the last contract having been executed on April 17, 1944 (R. 72-73, 76; 420-421, 748-755).

In addition to IATSE, a number of craft unions affiliated with the American Federation of Labor also represent groups of employees in the studios of respondents, and respondents had contracts with each of these organizations covering the various units over which they claimed jurisdiction (R. 80; 528, 585). These craft unions had joined together for bargaining purposes into the Conference of Studio Unions, hereinafter called C. S. U. (R. 80; 528-529).⁶

⁵ These will be referred to as Locals 44, 80, 727, and 728.

⁶ Member unions of the C. S. U. included the Brotherhood of Painters, Decorators and Paperhangers of America, herein called the Painters; International Brotherhood of Electrical Workers of America, called the I. B. E. W.; International Association of Machinists, called the I. A. M.; United Brotherhood of Carpenters and Joiners of America, called the Carpenters, etc. (R. 80; 528, 733).

For many years preceding the events involved in the instant case, jurisdictional disputes arose in the studios between locals of IATSE and member unions of C. S. U. (R. 81-82; 420-421, 657-660). Some of these disputes resulted in long drawn-out strikes called by one faction or the other (*ibid.*). The strike of March 12, 1945, and the ensuing discriminatory treatment of the complainants herein arose out of such a dispute. The 1945 strike was called by the Painters because of the refusal of the motion picture producers, including the respondents, to recognize its authority over the studio interior decorators, and was immediately joined by the other unions affiliated with the C. S. U. (R. 80; 527-528, 585-586, 587, 702-704).⁷

B. The refusal of the complainants and other IATSE members to work during the strike

As soon as the C. S. U. unions walked out of the studios on March 12, IATSE pledged itself to assist the respondents to maintain production, and directed its members not to honor the C. S. U. picket lines (R. 80-83; 764). IATSE also agreed to supply the producers with labor to maintain studio operations, and instructed its membership to perform whatever duties might be assigned regardless of whether such work had previously been performed by IATSE members or by employees presently on strike (R. 83;

⁷ As will be discussed hereinafter, *infra*, pp. 10, 22, the cause of the strike, and the positions of each of the parties in respect thereto, are not material to the issues in the instant case. However, for a detailed discussion of the events leading to the strike, and the arguments relative to the legality of the strike, see *Columbia Pictures Corporation*, 64 N. L. R. B. 490.

660). In addition IATSE brought in new employees to replace the strikers (R. 161, n. 71; 680-681).

Not all of the IATSE membership accepted the directives issued by its president. A number of IATSE members, including three complainants herein,⁸ objected to crossing the picket lines and did not report for work until after the strike was settled (R. 108, 112, 115; 290, 449-451, 467).

The other complainants, except for Stanley,⁹ although they were willing to cross the picket lines to continue in their regular duties, refused to perform work formerly done by strikers (R. 9-10, 142-143; 322, 638). Since such arrangements were not acceptable to respondents, these complainants withdrew their services altogether and they too thereafter engaged in a strike or concerted dispute with their employers (R. 9-10, 142-143; 241, 295-297, 322, 351-352, 382-385, 396-399, 440-441, 495-496, 638).

C. The strike settlement; the Cincinnati Agreement

The strike called by C. S. U. lasted from March 12, 1945, to the end of October 1945 (R. 10-12; 527-528, 722-723). Sometime in October the parties agreed to submit the dispute to the Executive Council of the Ameri-

⁸ Goudie, Coffey, and Howe.

⁹ Paul Stanley, a member of IATSE Local No. 728, had been employed by Warner as a lamp operator for many years (R. 115; 506-507). He continued to perform his usual duties during the strike, although on several occasions he was asked to go into the carpentry mill, where work had formerly been done only by members of the Carpenter union (R. 115-116; 507-509, 205). Stanley refused to go into the mill and about October 1, 1945, decided to discontinue working because of fear of violence on the picket lines (R. 116; 507-509).

can Federation of Labor, which met in Cincinnati, Ohio, between October 15 and October 24 (R. 11, 158; 668, 731). On the latter date the Council handed down its directive (called the Cincinnati Agreement) which reads in part as follows (R. 11, 158-160; 342, 571, 731-732) :

1. The Council directs that the Hollywood strike be terminated immediately.

2. That all employees return to work immediately.

3. That for a period of thirty days the International Unions affected make every attempt to settle the jurisdictional questions involved in the dispute.

4. That after the expiration of thirty days a committee of three members of the Executive Council of the American Federation of Labor shall investigate and determine within thirty days all jurisdictional questions still involved.

5. That all the parties concerned * * * accept as final and binding such decisions and determinations as the Executive Council committee of three may finally render.

The Cincinnati Agreement was accepted by respondents, IATSE and C. S. U., and each of them agreed to be bound by its provisions (R. 12; 668, 682-683, 732, 798). However, a question arose as to the effect of the agreement on the status of the strikers and the replacements, and a further meeting was held in Washington, D. C., to obtain clarification of the agreement (R. 12; 668-670, 683). It was determined that for a sixty day period *all the strikers*, as well as all replacements, would be kept on the payroll, but that

respondents would determine who was actually to perform the work to be done without interference by any of the unions involved (R. 11-12; 668-670, 676-677). October 31 was set as the date for the termination of the strike and on which all strikers were to return to work (R. 12; 671).

D. The discriminatory refusal to reinstate the complainants

As noted above, *supra*, pp. 3-4, the ten major motion picture producers had created the Producers Labor Committee to establish and determine a uniform labor policy, and Fred E. Pelton, as the Producers Labor Administrator, acted on behalf of and carried out the instructions issued by the Committee. Respondents at no time denied responsibility for the acts of Pelton and of the Committee.

On October 31, 1945, as the thousands of strikers were reporting back to work in accordance with the strike settlement agreement, respondents' employment officers received the following instruction from Pelton (R. 12, 113-114; 532-536, 747):

Members of I. A. T. S. E. who bolted from their locals and/or refused to come to work during the strike, shall not return to their regular I. A. jobs without approval of the I. A. local concerned. If you have called any of these people by mistake, explain the error to the individual and lay off such people.

This directive was issued by Pelton at the direction of the chairman of the Producers Labor Committee (R. 73-74; 534-535). It had not been requested by IATSE and had not been discussed with any official

of that organization prior to its issuance (R. 154; 271-272, 536, 539-540, 683-688).

As each of the complaints applied for reinstatement on and after October 31, they were refused employment by respondents in accordance with Pelton's instructions (R. 12, 15, n. 22, 153-154).¹⁰ Only one of them, Hentschel, was permitted to return to work on October 31, but he too was laid off at the end of the day (R. 13, n. 18; 442-445, 590-592).

E. The Board's conclusions and its rejection of respondents' defenses

Upon the facts set forth above the Board concluded that respondents had refused to reinstate the complainants in accordance with Pelton's instructions because of complainants' concerted refusal to cross picket lines or to perform certain work assigned them during the C. S. U. strike (R. 12-17). In so concluding, the Board considered the various defenses raised by respondents and found them to be without merit. Respondents' major arguments, and the Board's treatment thereof, may be summarized as follows:

1. The alleged illegality of the strike

Respondents argued before the Board that the strike called by the C. S. U. was illegal and that the complainants, as sympathy strikers, were therefore

¹⁰ There is no dispute that following the strike settlement agreement and the return of the C. S. U. strikers, the individual employees here involved applied for, and were refused, reinstatement. See for example, the testimony of White (R. 245-247); Stoica (R. 266-270); Batchelder (R. 282); Goudie (R. 290-291); Larson (R. 297-301), etc.

equally guilty of engaging in an unprotected activity. In addition, respondents alleged that those complainants who had refused to perform work assigned to them, although willing to continue their regular duties, were "wildcat" strikers and therefore not entitled to the protection of the Act (R. 17). The Board found it unnecessary to determine these issues since the Cincinnati Agreement provided that "all employees" were to be reinstated to their jobs for at least sixty days (R. 17-18; 668-672, 675-676, 731). Respondents, the Board found, had committed themselves to the terms of the Agreement, and thereby waived their right to assert the alleged illegal conduct of the strikers as a defense. By reinstating the thousands of C. S. U. members who had been on strike respondents indicated that the alleged illegality of the strike was not the true reason for their discrimination against the complainants (R. 17-18; 667-671, 691).

2. Respondents were not precluded by their contract with IATSE from reemploying the complainants without prior clearance by the union

Respondents contended before the Board that in requiring the complainants to obtain clearance with their IATSE locals before returning to work following the strike settlement, respondents were merely complying with the closed-shop provisions of their contracts with the union (R. 15, n. 21). The Board found that the record reveals no such requirement in the contracts, and that as long as the complainants remained members in good standing in the union they were eligible to work, and respondents could

employ them without prior clearance (R. 15, n. 21; 271-272, 286, 290, 544-545, 581, 591-592, 639-641, 645-646, 647, 751, 758). Furthermore, in only one instance, is there any contention that a union official requested any respondent to deny reinstatement to a complainant.

The exception involved the refusal of Loew's to reinstate Selgrath. William R. Walsh, Industrial Relations Manager of Loew's, stated that on or about October 31, he had been advised by IATSE's business agent, Barrett, that Selgrath was not to be rehired because he was not a member in good standing in the union (R. 16-17, n. 25; 579-580, 725-726). Selgrath was therefore denied employment until December 19, when Loew's was notified by the union that Selgrath could be reinstated (R. 134-135; 407-412). When Selgrath was rehired on December 19, he was taken on as a new employee, instead of in his former job as a key grip (R. 12-13, n. 17, 135; 411-412). The Board found, however, that by binding themselves to the terms of the Cincinnati Agreement both respondents and IATSE had in effect modified the closed-shop provision of their contract, and that until the jurisdictional dispute was finally settled the agreement that *all employees* were to be immediately reinstated to the jobs they held on March 12 superseded the closed-shop provisions in the contracts (R. 14, 16-17, n. 25; 668-669, 731).¹¹ The Board found therefore that Selgrath like the other complainants was denied reinstatement in accordance with Pelton's instruc-

¹¹ The Board did not hold that the closed-shop provisions of the contracts were thereafter void, but found that the parties had voluntarily suspended their operation for the sixty-day truce

tions, because of his participation in the strike and not because of his lack of good standing in IATSE (R. 10, n. 12, 12-17, 155-156).

3. Respondents did not deny reinstatement to the complainants because they had been replaced

Respondents argued that since the complainants were not unfair labor practice strikers, respondents had validly replaced them prior to their application for reinstatement and there were no jobs available when they applied. However, as the Board noted, if respondents did replace these strikers they also replaced the thousands of members of the C. S. U. unions who were participating in the strike (R. 18, n. 28; 558-566, 668-670, 676-679). The status of the strikers, and the replacements, was a major problem considered by the American Federation of Labor Executive Council in its attempts to resolve the issues and terminate the strike (R. 11; 562-563, 668-670). Pending the final determination of the jurisdictional dispute the Council directed, and respondents agreed, that all employees who were "on call"¹² on March 12, 1945, as well as all replacements, were to report to

period. When the union suspended or expelled eight of the complainants in June 1946, after the expiration of the truce period, the Board honored the closed-shop requirements and refused to order their reinstatement (R. 25-26; 233-234).

¹² The term "on call" is applied to regular employees actually working, or temporarily laid off and subject to recall directly by the studios without prior clearance through the unions. Temporary employees were obtained by a "call" to the local union offices who maintained a "call book" and sent job applicants to the studios as needed. (R. 93, n. 18; 234, 511, 544, 567, 581, 591-592, 597, 603, 647.)

work and be paid for the sixty-day period following October 31 (R. 11-12; 563-566, 670-671, 676-677). In accordance with that agreement all the C. S. U. members who had been replaced were permitted to return to work on October 31, and the replacements were withdrawn and paid for the sixty-day period without working (*ibid.*). The Board found, therefore, that the replacement of the complainants was not the real reason for their disparate treatment (R. 12-17).¹³ It found further that the reinstatement of Hentschel and his lay-off immediately thereafter following receipt of Pelton's directive is indicative of the fact that all the complainants would have been reemployed but for respondents' desire to penalize them because they had "bolted from their locals and/or refused to come to work during the strike" (R. 13, n. 18; 442-445, 590-592).

Accordingly the Board concluded that respondents had refused to reinstate the complainants in accordance with Pelton's instruction; that the instruction was not requested by IATSE nor required by the closed shop provisions of the contracts; and that by committing themselves to the terms of the Cincinnati Agreement respondents waived their right to withhold from the complainants reinstatement to their original jobs during the truce period (R. 12-18). The Board therefore concluded that Pelton's instruction was issued for the purpose of penalizing the complainants because they had engaged in a concerted activity, and

¹³ As the Board noted (R. 12, n. 16), there is no evidence in the record to support the contention that the complainants were excluded from the coverage of the Cincinnati Agreement.

that the respondents' discriminatory refusal to reinstate the complainants constituted interference, restraint and coercion proscribed by Section 8 (1) of the Act (R. 12-19).

II. The Board's order

The Board therefore ordered respondents to cease and desist from violating Section 8 (1) of the Act (R. 40-41)—

by discharging or refusing to reinstate any of their employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of their employment, because of their participation in concerted activities for their mutual aid or protection, or by any like or related conduct.

Affirmatively the Board awarded to each of the complainants, except Larson and Goudie,¹⁴ back pay from the date of the discrimination practiced against him to the date when such discrimination terminated (R. 41-43),¹⁵ and directed that ten complainants be reinstated to their former positions (R. 41-42).¹⁶

¹⁴ The Board found that following the denial of reinstatement, these complainants made no attempt to secure other employment, and that their losses of earnings were therefore willfully incurred (R. 32, 33-34).

¹⁵ As in the case of Larson and Goudie, *supra*, the Board in each instance considered and determined whether the complainants had made reasonable attempts to obtain other employment, and curtailed the back pay awards to exclude periods of willful loss of earnings. The Board's findings and determination on this point are fully set forth in its decision (R. 26-40) and are not rediscussed here.

¹⁶ Coffey, Cuccia, DeSanctis, Goudie, Howe, Larson, Selgrath, Seward, Simpson, and White. DeSanctis was reemployed on

Eight employees¹⁷ were expelled or suspended from IATSE in June 1946 (R. 25-26; 233-234). In view of the closed shop contracts between IATSE and respondents, the Board found that these complainants were no longer eligible for employment in their former jobs, and that it would not effectuate the policies of the Act to order them reinstated. The Board also terminated the back pay award as to each of these complainants as of the date they were suspended or expelled (R. 25-26).¹⁸ The other complainants had either been reinstated before the hearing or did not desire reinstatement, and they are therefore not included in the reinstatement provisions of the order.¹⁹

The Board also required respondents to post the usual compliance notices (R. 43, 47-52).

November 7, 1945, and Selgrath on December 19, 1945, as new employees. Since this may have involved loss of seniority, as well as pecuniary loss, the Board ordered them reinstated to their original jobs (R. 31-32, 39, 181-182; 412, 480-481, 647, 773).

¹⁷ Batchelder, Gidlund, Hand, Hentschel, Lamb, Lora, Sapp and Stoica.

¹⁸ Due to a typographical error the Board's decision indicates that Lora was expelled effective July 14, 1946, and back pay is terminated as of that date (R. 27-28). The record, however, shows that the disciplinary action against Lora taken by the union became effective on June 14, 1946, and that the Board intended to terminate his back pay, as it did the others, on the date of expulsion (R. 25-26; 233-234, 315, 729-730).

¹⁹ The Trial Examiner found that Warner discriminatorily discharged 14 prop workers on March 19, 1945, for their refusal to perform struck work, and recommended that back pay for those employees should commence as of that date (R. 166, 169). The Board found that the employees in question were not discharged as of that date, and consequently did not order any back pay prior to the refusal to reinstate the strikers on and after October 31, 1945 (R. 7-10, 42).

QUESTIONS PRESENTED

1. Whether respondents, by discriminatorily denying reinstatement to certain employees because of their participation in concerted activities, engaged in unfair labor practices within the meaning of Section 8 (1) of the Act.

2. Whether the Board's order, requiring respondents to reinstate and make whole certain employees, and to pay back pay to other employees, is valid and proper.

ARGUMENT

I. Respondents' refusal to reinstate the IATSE strikers violated Section 8 (1) of the Act

When the 1945 strike ended with the acceptance by all parties of the Cincinnati Agreement, respondents reinstated all the strikers in accordance with that agreement except the group of IATSE strikers, here involved, who had refused to cross picket lines or to perform struck work. This discriminatory treatment appears on its face to violate the statutory proscription of discrimination against employees for engaging in a concerted activity. The primary question in this case, therefore, is whether respondents' defenses are sufficient in law to relieve them of what appears to be a palpable violation of the Act. Respondents contended (1) that they were required under their union shop contracts to refuse reinstatement to the IATSE strikers; (2) that the strikers had been replaced prior to their application for reinstatement; and (3) that the primary or C. S. U. strike was illegal, so that the IATSE strikers, having assisted an illegal strike, were not entitled to reinstatement. We shall show that

the Board, upon a consideration of the record and of the relevant judicial authorities, properly rejected these defenses.

A. The Board properly rejected the defense that respondents' contract with IATSE required the discharge of the strikers

The record leaves no room for doubt that respondents' refusal to reinstate the IATSE strikers was in direct response to the instruction issued through Pelton by the Producers Labor Committee that IATSE strikers were not to be reinstated until they had been approved by their local (*supra*, pp. 8-9, R. 747). Equally indisputable is the fact that respondents are responsible for the actions of the Producers Labor Committee (*supra*, pp. 3-4; R. 523-525). Indeed there is no contention that IATSE requested the Committee to issue any such instruction as that which resulted in the refusal to reinstate these strikers. On the contrary, Brewer, International Representative of IATSE, testified that IATSE had no objection to any of the complainants' returning to work, provided that their reinstatement did not result in the displacement of other IATSE members who had replaced them (R. 656, 683-688). Since the Cincinnati Agreement provided that both strikers and replacements be kept on payroll for sixty days, the complainants should have been reinstated without affecting the status of any other IATSE member during the truce period.

The closed-shop provisions of the contracts which respondents had with IATSE did not require that employees who were temporarily out of work obtain

clearance from their locals before they could be reinstated. The contracts stated only that "employees * * * shall at all times be members in good standing of the International Alliance" (R. 751-767). There is no contention that any of the complainants were not members in good standing of IATSE during the period between October 31, 1945, and January 1, 1946, or, except in the case of Selgrath, discussed below, that the union had notified the producers that any of the strikers were not eligible for reinstatement. Moreover, the record contains substantial evidence to support the Board's finding that respondents had recalled employees to work without securing prior clearance from the union (R. 15, n. 21; 544-545, 567, 581, 591-592, 640-642, 646, 647). Consequently, even apart from the Cincinnati Agreement, respondents' contract with IATSE furnishes no defense to the refusal to reinstate the strikers. Cf. *N. L. R. B. v. G. W. Hume Co.*, 180 F. 2d 445, 447 (C. A. 9), and cases there cited.

The case of Selgrath stands upon a somewhat different footing, for Loew's had been advised by the union prior to Selgrath's application for reinstatement that he was not a member in good standing of IATSE. If the contract requiring union membership had been in effect when Selgrath applied for reinstatement on October 31, 1945, it would have justified the refusal to reinstate him. *Colgate-Palmolive-Peet Co. v. N. L. R. B.*, 338 U. S. 355. The Board found, however, that the union shop provisions had been temporarily abrogated by the Cincinnati Agreement, so that Loew's action in refusing to reinstate Selgrath was bottomed not on the inoperative union shop provisions

but on the same discriminatory policy which barred the reinstatement of the other IATSE strikers. This finding is supported by substantial evidence; indeed the clear terms of the Cincinnati Agreement admit of no other result.

The Cincinnati Agreement, it will be recalled, was a directive from the American Federation of Labor Executive Council to which all parties to the labor dispute, including IATSE and respondents, acquiesced. The agreement provided that pending the jurisdictional awards, "Each employee will return to the position he formerly occupied when the strike occurred" and that "management shall exercise its usual prerogative as to assignment of employees during the sixty-day interim period without interference on the part of the union involved" (*infra*, p. 23). The Council must have considered, and decided to hold ineffective, the closed-shop provisions of the various contracts then in effect; otherwise each union could object to the employment of any nonmember in a job it considered under its jurisdiction. Since the Cincinnati Agreement superseded the contracts in this respect, Loew's did not have to accede to the request of the local union not to reinstate Selgrath, and apparently did so because it coincided with its own desire to penalize him along with the other IATSE strikers for participating in the strike. Similarly, the reinstatement of Selgrath on December 19 as a new employee was contrary to the mandate of the Agreement that "Each employee will return to the position he formerly occupied." The Board therefore properly found that Loew's and IATSE

had waived the right to question Selgrath's reinstatement to his former position, and the refusal to re-employ him in that job because he had engaged in concerted activities constituted a violation of Section 8 (1) of the Act.

It is well established that in the absence of a valid closed-shop contract as provided for in Section 8 (3), a discharge or refusal to reinstate an employee at the request of a union violates the Act. *N. L. R. B. v. Electric Vacuum Cleaner Company, Inc.*, 315 U. S. 685, 693; *Colgate-Palmolive-Peet Co. v. N. L. R. B.*, 338 U. S. 355, 360. Since the proviso to Section 8 (3) creates an exception to the general purpose of the Act, both the proviso and contracts allegedly coming within its protection must be strictly construed. *N. L. R. B. v. Hume Co.*, 180 F. 2d 445, 447 (C. A. 9); *N. L. R. B. v. Don Juan, Inc.*, 178 F. 2d 625, 627 (C. A. 2). In the instant case there is no question as to the validity of the closed-shop contracts, except during the sixty-day truce period when the parties to the Cincinnati Agreement voluntarily suspended the operation of the closed-shop provisions for the sake of adjusting the jurisdictional disputes.²⁰ Since the contracts were not in effect on October 31, and during the truce period thereafter, respondents may not rely upon them as a bulwark against a finding of discrimination.

²⁰ The Board recognized that the union shop provisions regained their vitality after the truce period, and did not direct the reinstatement of employees thereafter suspended or expelled from the union (*supra*, p. 15).

B. The existence of replacements did not justify the discriminatory refusal to reinstate the IATSE strikers

Little need be said in disposing of respondents' contention that the IATSE strikers were not entitled to reinstatement because their jobs had been filled with replacements.²¹ The record establishes that it was the directive from the Producers Labor Committee, and not the existence of replacements, which motivated respondents' refusal to reinstate these strikers (*supra*, pp. 12-13; R. 747). Any doubt of this fact would be dispelled by the case of Hentschel, who was permitted to return to work on October 31, but was laid off at the end of the day (*supra*, p. 9). Compare the language of the directive (R. 747): "If you have called any of these people by mistake, explain the error to the individual and lay off such people."

Furthermore, the Cincinnati Agreement expressly provided that all strikers be reinstated, and specifically contemplated that the replacements might be displaced (R. 668-670, 676-677, 731-732). The existence of replacements was not, therefore, any bar to the reinstatement of these strikers. Further supporting the conclusion that the existence of replacements was no bar to the reinstatement of the IATSE strikers and was not the reason respondents refused to reinstate them is the fact that respondents reinstated the C. S. U. strikers and released their replacements with pay for the sixty-day truce period (R. 18, n. 28, 161-162; 564-566, 648-649, 652-653,

²¹ The Board assumed *arguendo*, that the complainants had been replaced during the strike, but made no findings in this respect (R. 18, n. 28).

670-679). In addition, this disparity of treatment as between the C. S. U. and IATSE strikers was a discriminatory act which alone would support a finding of unfair labor practices (*Hazel-Atlas Glass Co. v. N. L. R. B.*, 127 F. 2d 109, 118 (C. A. 4)).

C. Under the Cincinnati Agreement, respondents agreed to reinstate all strikers, and in fact reinstated all except the IATSE strikers. The alleged illegality of the strike, therefore, did not, and could not legally, furnish grounds for the failure to reinstate them

Respondents sought to justify their refusal to reinstate the IATSE strikers by contending that the primary C. S. U. strike was illegal, that the IATSE strikers were supporting this illegal strike, and that their jobs were therefore not protected by the Act under the doctrine of *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, and *N. L. R. B. v. Sands Mfg. Co.*, 306 U. S. 332. The Board rejected this contention without passing upon the legality of the strike. The Board found that, even if it were to be assumed that the strike was illegal, respondents by entering into the Cincinnati Agreement, agreed to permit the strikers to return to work and thereby waived or condoned the illegal character of the strike. We shall show (1) that substantial evidence supports the Board's finding that the Cincinnati Agreement provided for the reinstatement of all strikers, and (2) that having entered into the Agreement, respondents can no longer urge the alleged illegality of the strike as grounds for the refusal to reinstate the IATSE strikers.

1. Substantial evidence supports the Board's finding that the Cincinnati Agreement provided for the unconditional return to work of all the strikers including the complainants

This case does not present the usual picture of conflicting evidence as to the intent of the parties at the time the strike settlement was agreed upon. Although it was argued before the Board that the Cincinnati Agreement was not intended to include IATSE members who had refused to carry out the union's instructions, there is not a scintilla of evidence to support that argument. On the contrary, the Cincinnati Agreement expressly provided "That *all* employees return to work immediately" (R. 11; 731, emphasis supplied). That the term "all employees" meant all strikers who had been "on call" on March 12, 1945, the date of the inception of the strike, is established beyond question by the Washington clarification conference between representatives of the unions and respondents immediately after the Cincinnati meeting (R. 11; 668-671). Following their conference a release issued October 30 by President William Green of the American Federation of Labor, stated:

It is definitely and clearly understood that all striking employees at Hollywood who were on call on March 12 shall return to work immediately.

Each employee will return to the position he formerly occupied when the strike occurred.

Management shall exercise its usual prerogative as to assignment of employees during the sixty-day interim period *without interference on the part of the unions involved.* [Emphasis supplied.]

See, *Association of Motion Picture Producers, Inc.*, 79 N. L. R. B. 466, 497-498.

The Agreement was meticulously carried out as to the C. S. U. members who had participated in the strike. In fact, they not only were permitted to return to their former jobs, but the replacements were told to "standby" without working, and shortly after October 31, were paid for the full sixty-day period and ordered not to report to the studios unless called (R. 18, n. 28, 161-162; 570-571, 648-649, 652-653, 670-679). Respondents are thus in the difficult position of asserting not only that the IATSE strikers were outside the Agreement, notwithstanding explicit language to the contrary, but also that the allegedly illegal C. S. U. strikers were entitled to reinstatement, although the IATSE men who merely supported the "illegal" strikers were not. The inherent inconsistency in respondents' position serves further to support the Board's finding, already amply supported by the record, that the Cincinnati Agreement provided for the reinstatement of the IATSE strikers.

2. Having settled the strike by an agreement under which all the strikers were to resume work on October 31, respondents cannot urge the alleged unprotected character of the strike as a ground for their refusal to reinstate the complainants. Such denial of employment to the complainants for participation in the strike must therefore be viewed as discrimination against their concerted activity in violation of Section 8 (1) of the Act

The law is well-settled that where an illegal strike is settled by an agreement providing for the reinstatement of all strikers, the employer may not thereafter rely upon the illegality of the strike to justify discriminatory treatment of the strikers. *N. L. R. B. v. Aladdin Industries, Inc.*, 125 F. 2d 377, 382 (C. A. 7),

certiorari denied, 316 U. S. 706; *Stewart Die Casting Corp. v. N. L. R. B.*, 114 F. 2d 849, 853-856 (C. A. 7), certiorari denied, 312 U. S. 680; *Hazel-Atlas Glass Co. v. N. L. R. B.*, 127 F. 2d 109, 118 (C. A. 4); *N. L. R. B. v. Mt. Clemens Pottery Co.*, 147 F. 2d 262, 267 (C. A. 6); see also *N. L. R. B. v. Reed & Prince Mfg. Co.*, 118 F. 2d 874, 886 (C. A. 1), certiorari denied, 313 U. S. 595. Consequently the Board found it unnecessary in this case²² to pass upon the contention that the strike was illegal. The Board held in accordance with the cases cited above that even if the strike had been illegal, respondents, having agreed to reinstate all strikers, could not thereafter rely upon the alleged illegality of the strike to justify its discrimination against some of them.

As the court stated in the *Aladdin* case, where the employees had been discharged for engaging in a sit-down strike and defying a court injunction (125 F. 2d at 382):²³

²² Actually the Board found in another proceeding that the strike was not illegal. *Columbia Pictures Corp.*, 64 N. L. R. B. 490, 505-515.

²³ As the court noted, the employees in the *Aladdin* case had been discharged because of their illegal conduct, but these discharges were abrogated by the subsequent settlement agreement. In the instant case respondents contended that the Warner propmakers were actually dismissed on March 19, and that the other IATSE strikers were constructively discharged. The Board found that the alleged dismissal of the propmakers was but a "tactical maneuver" to induce these employees to perform struck work, and that actually none of the IATSE strikers were discharged (R. 7-10). Since the Cincinnati Agreement clearly provided for the return to work of all strikers "on call" as of March 12, the day the strike started, it is immaterial under the *Aladdin* doctrine whether any of the complainants were discharged after March 12 for participating in the strike.

We can thus safely and fairly narrow our issues to the date which marked the opening of the plant, after the March, 1937, sit down strike. If we were to go back of March 2, the employees would be without right—for their sit down strike and their refusal to obey the order of the court, followed by their discharge because of such action, lost to them the right they otherwise might have enjoyed as employees, with an unsettled labor dispute.

On the other hand, it would be unfair, in view of this settlement to give to respondent a right which it deliberately and, as we believe, wisely, waived in the interests of peace and harmony. *When respondent invited its employees to return to their old places, regardless of the sit down strike, it waived its right to treat the employees as though they were wrong doers* * * *.

* * * * *

Viewing the situation as we do, namely, that a settlement of mutual claims and grievances took place, we assume, and conclude, that grievances antedating said settlement which marked the reopening of the plant, were, by respondent, fully and completely waived. [Emphasis supplied.]

The holding of the *Aladdin* case, and of the other cases cited *supra*, pp. 24-25, is *a fortiori* applicable here where the conduct of the IATSE strikers was not marked by violence, defiance of the courts, seizure of respondents' property, or even breach of a no-strike

clause.²⁴ If their strike could properly be characterized as illegal at all, it derived that character solely from the allegedly illegal character of the C. S. U. strike. Yet respondents had no hesitation in reinstating the C. S. U. members, and in abandoning as to them its argument that the strike was illegal. Under such circumstances even if respondents were "under no legal compulsion to take the strikers back * * * when their breach was overlooked, and it was decided to reinstate them, they were entitled to even handed treatment, and the exclusion of any of them for reasons condemned by the statute would have been an unfair labor practice." *Hazel-Atlas Glass Co. v. N. L. R. B.*, 127 F. 2d 109, 118 (C. A. 4).

Having waived the allegedly unprotected nature of the strike, respondents have no reasonable explanation for the issuance of the Producers Labor Committee's instruction to discriminate against the complainants. In fact, respondents attempted to

²⁴ This case does not present the question of employees refusing to accept changes in working conditions but continuing to stay on the employer's premises to perform only that work which they are willing to perform. Compare, *G. C. Conn, Ltd. v. N. L. R. B.*, 108 F. 2d 390, 397 (C. A. 7); *N. L. R. B. v. Montgomery Ward Co.*, 157 F. 2d 486, 496 (C. A. 8). Here all of the complainants who refused to perform struck work left the studios as soon as it became apparent that they could not continue in their own duties without also performing the work formerly done by the carpenters and painters, and stayed away as full-fledged, not "part-time" strikers (R. 10). Compare, *Home Beneficial Life Ins. Co. v. N. L. R. B.*, 159 F. 2d 280 (C. A. 4), certiorari denied, 332 U. S. 758.

avoid the fact that the complainants were not reinstated in accordance with the instruction by urging other reasons for their action. However, these reasons are equally without merit, see *supra*, pp. 17-24, and the Board properly concluded that but for the desire of the Producers Labor Committee to chastise the complainants because they had refused to cooperate with respondents during the strike, these employees would have been reinstated at the time that all other strikers were permitted to return to work. The instruction not to reinstate the complainants, which was put into effect by respondents, constituted an unwarranted restraint upon the employees' right to engage in concerted activity, and therefore violated Section 8 (1) of the Act.

II. The Board's order is valid and proper

The cease and desist provisions of the Board's order (R. 40-41) are specifically designed to remedy the unfair labor practice found, and an order of such limited character is clearly warranted under Section 10 (c) of the Act. Cf. *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426, 437-438; *May Department Stores Co. v. N. L. R. B.*, 326 U. S. 376, 389-393; *N. L. R. B. v. Sun Tent-Luebbert Co.*, 151 F. 2d 483, 489 (C. A. 9).

The Board's authority to remedy violations of Section 8 (1) of the Act involving discrimination against employees by directing reinstatement with back pay is well established. *Gullet Gin Co. Inc. v. N. L. R. B.*, 179 F. 2d 499, 502 (C. A. 5); *N. L. R. B. v. Austin Co.*, 165 F. 2d 592, 596 (C. A. 7); *N. L. R. B. v.*

Phoenix Mutual Ins. Co., 167 F. 2d 983, 988-989 (C. A. 7); *N. L. R. B. v. Vail Mfg. Co.*, 158 F. 2d 664, 667 (C. A. 7), certiorari denied, 331 U. S. 835. The inclusion among the complainants of supervisory personnel, such as White and Sapp (R. 37, n. 57) has not heretofore been questioned by respondents (cf. *N. L. R. B. v. Cheney California Lumber Co.*, 327 U. S. 385) and in any event it is settled that discrimination against supervisors who were "employees" under the Wagner Act may still be remedied by the Board despite the 1947 amendment to Section 2 (3) of the Act. See *Eastern Coal Corp. v. N. L. R. B.*, 176 F. 2d 131, 137 (C. A. 4); *N. L. R. B. v. Universal Camera Corp.*, 179 F. 2d 749, 754-755 (C. A. 2), certiorari granted, 339 U. S. 962; *Foreman's Assn. of America v. Budd Mfg. Co.*, 169 F. 2d 571, 575, certiorari denied, 335 U. S. 908.

Respondents argued before the Board that the Board could not remedy the refusal to employ Seward, Coffey, Howe, and Stanley because no charge had been filed in their behalf (R. 6; 708). The record, however, establishes that complainants' attorney had submitted a charge to the Board's Regional Office for Seward, Coffey and Howe, but that through some administrative oversight in the Regional Office the charge was never docketed (R. 7, n. 5; 610-613, 704-709). Furthermore, respondents' counsel admitted that he had discussed the case of Seward, Coffey, and Howe with a Field Examiner of the Board, and was therefore fully apprised of the fact that these employees were alleging that they had received discriminatory treatment (R. 7, n. 5; 708-709). And the

Board's original Complaint, issued about two months before the hearing, specifically alleged that respondents had discriminatorily denied employment to all four employees (R. 7, n. 5; 110). As the Board noted therefore, respondents had ample notice that the Board intended to process the cases of Seward, Coffey, Howe, and Stanley, and have failed to show that they were in any manner prejudiced by the lack of a formally docketed charge (*ibid.*).

Furthermore, respondents' contention that the Board may not grant affirmative relief to these complainants is based upon a misconception as to the purpose of the charge. "It merely sets in motion the machinery of an inquiry." *N. L. R. B. v. Indiana & Michigan Electric Co.*, 318 U. S. 9, 18. Once charges have been filed the Board may thereafter consider and remedy unfair labor practices similar to those alleged, even though not specifically set forth in the charges, particularly, where as here, they were covered in the complaint, respondents had ample opportunity to defend, and they have failed to show that they were prejudiced. *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 224-225; *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 369; *Consumers Power Co. v. N. L. R. B.* 113 F. 2d 38, 42 (C. A. 6); *N. L. R. B. v. American Creosoting Co.*, 139 F. 2d 193, 195 (C. A. 6); *N. L. R. B. v. Nebel Knitting Co.*, 103 F. 2d 594 (C. A. 4), enforcing as modified 6 NLRB 284; *N. L. R. B. v. Bird Machine Co.*, 161 F. 2d 589 (C. A. 1), enforcing 65 NLRB 311, 316.²⁵ It is unnecessary to consider here

²⁵ See also, *Fort Wayne Corrugated Paper Co. v. N. L. R. B.*, 111 F. 2d 869, 873 (C. A. 7); *Stewart Die Casting Corp. v. N. L. R. B.*, 114 F. 2d 849, 856-857 (C. A. 7); *Red Arrow Freight Lines, Inc. v. N. L. R. B.*, 180 F. 2d 585, 587 (C. A. 5).

whether the 1947 amendment to Section 10 (b) of the Act restricts the Board to violations named in the charge.²⁶ The amendment, being purely procedural, is not retroactive, and hence is not applicable to this proceeding which was commenced prior to the effective date of the amendments. *N. L. R. B. v. Itasca Cotton Mfg. Co.*, 179 F. 2d 504 (C. A. 5); *N. L. R. B. v. Brozen*, 166 F. 2d 812, 813 (C. A. 2); *N. L. R. B. v. National Garment Co.*, 166 F. 2d 233, 238 (C. A. 8), certiorari denied, 334 U. S. 845; cf. *Cathey Lumber Co.*, 86 NLRB 157.

CONCLUSION

For the reasons stated it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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SEPTEMBER 1950.

²⁶ Section 10 (b) as amended, provides in part:

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, * * * shall have power to issue and cause to be served upon such person a complaint * * *: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing [and service] of the charge * * *.

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Secs. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage

membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, Secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. * * *

In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

2. The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. III, Sec. 141, *et seq.*) are as follows:

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * *

“SEC. 2. When used in this Act—* * *

(3) The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * *

“(11) The term ‘supervisor’ means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * *

“SEC. 8 (a). It shall be an unfair labor practice for an employer—

“(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

“SEC. 10 (c). The testimony taken by such member, agent, or agency of the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

“(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order, and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the

Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *."

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

No. 12568

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

WARNER BROS. PICTURES, INC., COLUMBIA PICTURES
CORPORATION and LOEW'S INCORPORATED,

Respondents.

On Petition for Enforcement of an Order of the National
Labor Relations Board.

BRIEF OF RESPONDENTS WARNER BROS.
PICTURES, INC., COLUMBIA PICTURES
CORPORATION AND LOEW'S INCORPORATED.

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No. 12568

IN THE

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vs.

WARNER BROS. PICTURES, INC., COLUMBIA PICTURES
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Respondents.

BRIEF OF RESPONDENTS WARNER BROS.
PICTURES, INC., COLUMBIA PICTURES
CORPORATION AND LOEW'S INCORPORATED.

Statement of the Case.

The National Labor Relations Board has petitioned for enforcement of an order requiring respondents to take affirmative action with respect to reinstatement or payment of back pay to certain former employees who were members of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (hereinafter called the "IATSE"). The issues involve the application of the National Labor Relations Act (hereinafter sometimes referred to as the "Act") to uncontradicted evidence. There is no conflict of *evidence* with respect to the facts

which are material to this Court's decision in this proceeding. However, as to certain facts which are material to the Board's decision the Board has gone outside the evidence and made findings which are not supported by evidence as required by the Act.¹ The Board has also failed to make findings with respect to certain material facts which are supported by uncontradicted evidence.² An examination of the evidence which is material to this controversy and a proper application of the statute to those facts will disclose that the Board is not entitled to the enforcement of its order.

In order that the material facts may be considered in their proper chronology, a restatement and supplementing of the facts stated in the Board's Petition is required. The IATSE and the Conference of Studio Unions (hereinafter referred to as "CSU") were rival confederations of unions in the motion picture industry. Although both groups of unions were affiliated with the American Federation of Labor, they had for many years engaged in disputes with respect to which union should represent or have jurisdiction over employees doing various classifications of work in the motion picture industry (Pet. Br., 5). Each had sought to expand its power by claiming exclusive jurisdiction

¹The Board's finding that respondents agreed to abide by the Cincinnati Directive and that they agreed to reinstate complainants is not supported by any substantial evidence. The Board's finding that respondents did not discharge certain employees who the complaint alleges were discharged and that such employees were strikers is contrary to the uncontradicted evidence.

²The Board concedes that the CSU struck for the purpose of compelling respondents to recognize a CSU union as the collective bargaining representative of Interior Decorators (Pet. Br. 5), but it failed to find the undisputed fact, based upon official notice which it was requested to take of its own records, that at the time the CSU struck, the Board was conducting a hearing for the purpose of determining whether the CSU union or an IATSE union should be designated as the collective bargaining representative of Interior Decorators [R. 688-701; 61 NLRB 1030].

over first one type of work and then another, and the jealous ambitions of each of these powerful federation of unions to prevail over the other had, over a period of years, "resulted in long drawn out strikes called by one group or the other." (Pet. Br., 5.)

There was a group of employees in the motion picture industry variously known as Set Dressers, Set Decorators and Interior Decorators. These employees supervised and directed Property Men, who were a part of the stage crew represented by the IATSE, in the placement of so-called "props" upon sets or stages where motion pictures were photographed [R. 659]. On May 15, 1939, long before the events here in question, the IATSE had asserted its claim to jurisdiction over Set Dressers by issuing to its Local No. 44 a charter granting Local No. 44 jurisdiction over Set Dressers, along with Property Men, Prop Makers, and other classifications of employees [R. 776-7]. Prior to the events in question, Local 1421 of the Painters Union (which was a member of CSU) asserted its claim of jurisdiction over Set Dressers.³

The major motion picture producers, including respondents, finding themselves caught between the rival claims of a CSU union and an IATSE union over the right to represent or have jurisdiction over Set Dressers, under-

³The Board was requested to take official notice of its own records which show that on December 6, 1944, Local 1421 of the Painters Union filed with the National Labor Relations Board a proceeding under the War Labor Disputes Act (57 Stat. 163) for the purpose of requiring the Board to take a strike vote among its members employed by the major motion picture producers upon the question of whether production in time of war should be interrupted on account of the claim of Local 1421 to jurisdiction over Set Decorators, otherwise known as Set Dressers and Interior Decorators; and that on January 6, 1945, the Board conducted elections in each of the major motion picture studios, including the studios of respondents, and in each case a majority of the employees entitled to vote voted in favor of a strike [R. 702-704].

took to provide for the orderly settlement of the dispute by the filing of an Employer's Representation Petition with the National Labor Relations Board on February 28, 1945, in which the CSU union and the IATSE union were named as rival claimants for the right to represent Set Dressers.⁴ The stage was thus set for the Board to determine the appropriate unit in which Set Dressers should be included and whether the CSU union or the IATSE union should represent Set Dressers. On March 7, 1945, the hearing commenced before a Trial Examiner appointed by the Board, and was held from March 7 to 17, 1945, inclusive [R. 701; 61 NLRB 1030]. In this hearing the IATSE participated, of course to protect and establish its claim that the jurisdiction over these employees belonged to it and not to the CSU. In the midst of the hearing, on March 12, 1945, without awaiting the conclusion of the hearing and the decision by the Board, the CSU union called a strike against the major motion picture producers "because of the refusal of the motion picture producers, including respondents, to recognize its authority over the studio interior decorators, and was immediately joined by the other unions affiliated with the C.S.U." (Pet. Br., 5). The other CSU unions joined in the strike and participated in the picketing [R. 587, 334-335].

The IATSE recognized that although the strike was nominally against the major motion picture producers, it was actually against the IATSE, and that the strike had

⁴The Board was requested to take official notice of its own records which showed that fact and also the fact that a representation petition previously filed by the CSU union involving other classifications of work was amended by the CSU union to include its claim over Set Dressers; that the IATSE union intervened in that proceeding; and that the proceeding filed by the CSU union and the proceeding filed by the motion picture producers were consolidated [R. 688-701; 61 NLRB 1030].

as its purpose the objective of compelling the major motion picture producers to reject the claim of the IATSE to jurisdiction over Set Dressers and to recognize the jurisdiction of the CSU union without waiting for the decision of the National Labor Relations Board. The IATSE believed that if the strike of the CSU were to be successful, the CSU, in a settlement of the strike, might be able to force the producers not only to recognize a CSU union as the collective bargaining agent of Set Dressers but also to recognize other CSU unions as the collective bargaining agents of employees in other disputed classifications of work performed by IATSE members, but claimed by other CSU unions, and that the result of a successful strike by the CSU might be the destruction of the influence and position of the IATSE in the motion picture industry [R. 657-9].

The IATSE immediately undertook concerted action to protect itself. As stated in petitioner's brief "IATSE pledged itself to assist the respondents to maintain production and directed its members not to honor the CSU picket lines." (Pet. Br., 5.) The President of the IATSE entered into an agreement with the producers that members of the IATSE would keep the studios running and would do whatever work the producers required [R. 223]. IATSE representatives made the offer on behalf of its members to do carpenter work and other work abandoned by the CSU strikers, and respondents accepted that offer [R. 86-90, 219-226, 240-241]. Petitioner in its brief states the agreement between the IATSE and respondents as follows:

"IATSE also agreed to supply the producers with labor to maintain studio operations, and instructed its membership to perform whatever duties might be assigned regardless of whether such work had previously been performed by IATSE members or by employees presently on strike." (Pet. Br., 5.)

Of the more than 10,000 members of the IATSE who were working in the studios, there was only a small minority of about 100 who refused to join in the concerted activity undertaken by their union and to carry out the agreement made between their union and the major motion picture producers [R. 667, 538-539]. Complainants were among the 100 who refused to go along with their union's concerted activity and refused to carry out the agreement made for them by their collective bargaining agent.

When fourteen complainants at Warner Bros.⁵ and two complainants at Columbia⁶ refused to perform carpenter work or painting work as directed, they were told that they were discharged and were handed discharge slips [R. 634, 637, 211-12, 229, 242, 264, 281, 307, 320, 339, 362, 372, 425, 480, 485, 501, 549, 352-3, 441]. These employees understood that they were discharged [R. 211-12, 227, 229, 241, 345, 362, 372, 425, 501, 352-3]. Indeed, in the complaint it was the Board's theory that they were discharged [R. 714-15]; that was the theory of the Board's attorney [R. 218, 235, 425, 441]; and the Trial Examiner found that the fourteen Warner Bros. complainants were discharged [R. 147]. The Board's theory at the hearing before the Trial Examiner was that complainants were discharged because they had refused to do carpenter work or painting work, that such refusal was a concerted activity protected by the Act, and that their discharge was an interference with such concerted activity [R. 714-15]. The Trial Examiner made his findings in accordance with the Board's theory, calling the refusal to perform services a "partial strike" [R. 155], which he

⁵Sapp, White, Stoica, Batchelder, Hand, Lora, Bonning, Gidlund, MacKellar, Rogers, DeSanctis, Lamb, Simpson and Jensen.

⁶Cuccia and Hentschel.

decided was a protected activity, apparently in reliance upon the Board's decision in *Montgomery Ward & Co.*, 64 NLRB 432, 435 [R. 155]. By the time the Board got around to rendering its decision, the Board's doctrine of "partial strike" had been blasted by decisions of the Courts of Appeals.⁷ In its decision, which the Board here seeks to have enforced, the Board did an abrupt about-face and found that said complainants had not been discharged at all.

All of the evidence is contrary to that finding—the oral notification of discharge, the issuance of discharge slips, the understanding of the employees that they had been discharged, the removal of their names in due course from the payroll record, and in the case of those reemployed, their reemployment as new employees.

The fact that complainants discharged by Warner Bros. were offered the opportunity to return to work if they would perform services as directed in no way affects the fact that they were actually discharged. Complainants did not accept such offer and were removed from the payroll. In the case of those discharged employees who later sought reemployment, they were placed on the payroll as new employees.⁸

The uncontradicted evidence is that the employees named in footnotes (5) and (6) were discharged, and there is no evidence at all to support the Board's finding that they were not discharged.

⁷*NLRB v. Montgomery Ward & Co.* (8th Cir.), 157 F. 2d 486, refusing enforcement of the Board's order reported in 64 NLRB 432; *C. G. Conn, Ltd. v. NLRB* (7th Cir.), 108 F. 2d 390, 397; *Home Beneficial Life Insurance Co. v. NLRB* (4th Cir.), 159 F. 2d 280; cert. denied 332 U. S. 758.

⁸Among the employees discharged by Warner Bros. were Pattern Makers Schnell, Horner and DeSanctis. Schnell and Horner were reemployed before the end of the strike and DeSanctis was reemployed after the strike ended. When reemployed, they were treated as new employees [R. 647-8, 771, 480-81, 615].

In addition to the complainants who were discharged, Warner Bros. told one complainant⁹ who refused to perform carpenter work as directed to “go home” and no formal discharge slip was issued to him [R. 297]. Warner Bros. and Loew’s Inc. each told a complainant¹⁰ who refused to do carpenter work as directed to see his local union and no formal discharge slip was issued [R. 497, 393]. At Loew’s one complainant¹¹ who refused to do painting work as directed, and at Warner Bros. one complainant¹² that refused to do carpenter work as directed left the studios and did not return during the period of the strike [R. 290, 383]. At Warner Bros. two complainants¹³ failed to report for work at any time during the strike and one complainant¹⁴ failed to report for work during the last few weeks of the strike [R. 449, 451, 466, 467, 468, 508, 509].

The studios continued in operation during the strike. The IATSE, in accordance with its agreement to maintain studio operations, furnished employees to take the place of the CSU strikers. With respect to the IATSE members who were discharged or left work, the IATSE, in accordance with its closed shop agreement [R. 748], furnished employees to replace them.

The next material event indicated by the evidence is that on October 25, 1945, the Executive Council Committee of

⁹Larson.

¹⁰Seward and Selgrath.

¹¹Groth.

¹²Goudie.

¹³Howe and Coffey.

¹⁴Stanley.

the American Federation of Labor, at its meeting in Cincinnati, issued a directive to the *unions* "That the Hollywood strike be terminated immediately" and "That all employees return to work immediately." The Directive further provided that if the International unions could not settle their claims to jurisdiction in Hollywood within thirty days, then a committee appointed by the Executive Council of the American Federation of Labor should make such determination within thirty days thereafter, and that the *unions* involved should accept the decision of the Executive Council Committee as final and binding.

The Board states in its brief, "Sometime in October the parties agreed to submit the dispute to the Executive Council of the American Federation of Labor which met at Cincinnati, Ohio, between October 15 and October 24." (Pet. Br. 6-7.) There is no evidence whatsoever that *respondents* agreed to submit the dispute to the Executive Council of the American Federation of Labor. The Board also states in its brief, "The Cincinnati agreement was accepted by respondents, the IATSE and CSU, and each of them agreed to be bound by its provisions." (Pet. Br. 7.) There is no evidence whatsoever that *respondents* agreed to abide by the directive or abide by the decision of the Executive Council Committee.

The CSU obeyed the Directive and called off the strike on October 31, 1945 and its strikers returned to work [R. 528, 671]. The dispute between the CSU returning strikers and the IATSE members who were performing strikers' jobs remained unsettled for sixty days pending the decision of the Executive Council Committee as to whether the CSU unions or the IATSE unions had jurisdiction over these jobs.

Complainants were not members of the CSU; they were members of the IATSE. When they were discharged or left work or failed to show up for work, respondents replaced them and on October 31, 1945 an employee furnished by the IATSE was working in every job which these discharged IATSE members had left with the exception of one Pattern Maker's job for which DeSanctis was reemployed [R. 615-628, 771-774]. There was no dispute between complainants, who were IATSE members, and the employees who had been furnished by the IATSE to replace complainants, as to which union had jurisdiction over their jobs. Complainants and the employees who replaced them being members of the same organization—the IATSE, there was nothing for the Executive Council Committee to decide as between them. No problem existed from a jurisdictional standpoint as to whether the work should be done by the one or the other.

At the conclusion of the strike complainants and other IATSE members who had failed to perform services during the strike as directed by their union and their employers, demanded that they be given the jobs then held by the persons supplied by the IATSE to do the work complainants had refused to perform. The respondents refused such demand. However, as vacancies occurred and there were jobs for which those members were qualified, many of them were employed or offered employment by respondents or other producers. [R. 311-312, 343, 377, 388, 411-412, 430, 474, 505.]

The Board found that "The Respondents, however, instead of rehiring these complainants, obliged them to obtain clearance from the Alliance [the IATSE] solely

because of their activities during the strike" [R. 12] and concluded that respondents "could not lawfully discriminate against complainants solely because of their activities during the strike" [R. 13].

Questions Presented.

1. Were complainants engaged in concerted activities protected by Section 7 of the National Labor Relations Act?
2. If complainants were not engaged in concerted activities protected by the Act, has the National Labor Relations Board power to require respondents to reinstate or pay back pay to complainants who were refused reinstatement because they engaged in such activities?
3. Could a purported agreement by respondents to reinstate complainants, transform into a concerted activity protected by the Act that which is not a concerted activity protected by the Act?
4. Is there reliable, probative, and substantial evidence that respondents agreed to reinstate complainants?

ARGUMENT.

I.

The Board Was Without Authority to Issue the Order Which It Seeks to Enforce, Because the Activities of Complainants Which It Found to Be the Cause of Respondents' Refusal to Reinstate Complainants Were Not Activities Protected by the Act. The Board's Power Is Limited to Remedying Interference With Rights Which Are Protected by the Act.

1. The Act Does Not Protect All Activities of Employees, and Employers Are Free to Discharge or Refuse Reinstatement to Employees Because They Engage in Activities Which Are Not Protected by the Act.

Section 7 of the Act which was in effect in 1945 provided, among other things, that employees should have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," and Section 8(1) of the Act provided that it was an unfair labor practice "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7." If the provisions of Section 7 were to be interpreted literally, every concerted activity undertaken by employees for their mutual aid or protection would be activity protected by the Act. It is well established that such literal interpretation of the Act is not permissible because it is plain that Congress never intended that every form of concerted activity by employees for their mutual aid or protection should be protected by the Act.

The most recent expression of the Supreme Court upon this subject is found in *International Union v.*

Wisconsin Employment Relations Board, 336 U. S. 245. There the employees of a company operating a manufacturing plant in Wisconsin, but which was engaged in interstate commerce, had engaged in the concerted activity of "calling repeated special meetings of the union during working hours, at any time the union saw fit, which the employees would leave work to attend." This was done without notice to the employer and without any assurance of when or whether the employees would return. The purpose of the union was to bring pressure on the employer to accede to union demands. The Wisconsin Employment Peace Act made such activities an unfair labor practice. The Wisconsin Supreme Court enforced an order of the state board enjoining such activities. The argument made to the United States Supreme Court was that such activities were protected by Section 7 of the National Labor Relations Act and that the state was without authority to enjoin such acts because the injunction was in conflict with the National Labor Relations Act. The Court held that such activities were not protected by the National Labor Relations Act. It said:

"The bare language of Section 7 cannot be construed to immunize the conduct forbidden by the judgment below, and therefore the injunction as construed by the Wisconsin Supreme Court does not conflict with Section 7 of the Federal Act." (P. 257.)

After pointing to numerous decisions which hold that various types of concerted activity are not protected by the Act, the Court said:

"That Congress has concurred in the view that neither §7 nor §13 confers absolute right to engage

in every kind of strike or other concerted activity does not rest upon mere inference; indeed the record indicates that, had the Courts not made these interpretations, the Congress would have gone as far or farther in the direction of limiting the right to engage in concerted activities including the right to strike.” (P. 260.)

* * * * *

“We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by Federal statute nor was it recognized and approved thereby.” (Pp. 264-5.)

There have been many examples of concerted activities of employees which the courts have held are not protected under the provisions of Section 7 of the Act. For example: *Southern Steamship Co. v. NLRB*, 316 U. S. 31 (strike during the voyage of a ship, which violated the statute prohibiting mutiny); *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 750 (mass picketing, obstruction of factory entrance, threats, violence and picketing of employees’ homes); *NLRB v. Sands Mfg. Co.*, 306 U. S. 332 (strike in violation of an agreement between a union and an employer); *NLRB v. Fansteel Corp.*, 306 U. S. 240 (sit-down strike); *NLRB v. Wytheville Knitting Mills* (3rd Cir.), 175 F. 2d 238 (hurling obnoxious and offensive epithets at non-strikers); *Joanna Cotton Mills Co. v. NLRB* (4th Cir.), 176 F. 2d 749 (circulating petition for removal of a foreman); *NLRB v. Reynolds International Pen Co.* (7th Cir.), 162 F. 2d 680 (walk-out of employees in protest against change of their foreman); *NLRB v. Perfect Circle Corp.* (7th Cir.), 162 F. 2d 566 (obstructing company manager from entering plant); *NLRB v. Scullin Steel Co.* (8th Cir.), 161 F. 2d 143 (refusal to perform services

as directed by the employer); *NLRB v. Kopman-Woracek Shoe Mfg. Co.* (8th Cir.), 158 F. 2d 103 (refusal to perform services as directed by the employer); *NLRB v. Montgomery Ward & Co.* (8th Cir.), 157 F. 2d 486 (refusal to perform strikers' work as directed by employer); *NLRB v. Indiana Desk Co.* (7th Cir.), 149 F. 2d 987 (strike to compel employer to violate the Wage Stabilization Act); *NLRB v. Draper Corp.* (4th Cir.), 145 F. 2d 199 (wildcat strike by a minority group which interfered with concerted activity of union); *United Biscuit Co. v. NLRB* (7th Cir.), 128 F. 2d 771 (refusal to perform strikers' work as directed by employer); *Hazel-Atlas Glass Co. v. NLRB* (4th Cir.), 127 F. 2d 109 (refusal of foreman to perform striker's work as directed by employer); *C. G. Conn, Ltd., v. NLRB* (7th Cir.), 108 F. 2d 390 (refusal of employees to work overtime as directed by employer).

In *Elk Lumber Co.*, 26 LRRM 1493, a decision of the National Labor Relations Board dated September 20, 1950, the Board recognized the principle that not all concerted activities for the mutual aid or protection of employees are protected by the Act, stating with respect to a slow-down:

"Section 7 of the Act guarantees to employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; however, both the Board and the Courts have recognized that not every form of activity that falls within the letter of this provision is protected."

In view of this well established principle of law, we now address ourselves to the question of whether complainants were engaged in concerted activities protected by Section 7 of the Act.

2. If Complainants Were Engaged in a Strike, It Was a "Wild Cat Strike"; i. e., a Strike by a Minority Group Which Interfered With the Concerted Activity Undertaken by the Group's Collective Bargaining Agent. A Wild Cat Strike Is Not a Concerted Activity Protected by the Act.

Notwithstanding the uncontradicted evidence that 16 complainants were discharged and that the remaining 7 complainants either left their work or failed to report for work without participating in the CSU strike, the Board nevertheless found that complainants "were strikers, engaged in concerted activities for their mutual aid or protection" [R. 10]. Assuming for the purpose of argument that complainants "were strikers," as found by the Board, they were engaged in a strike in defiance of the concerted activity undertaken by their union.¹⁵ The concerted activity undertaken by the IATSE was the activity of not striking and, instead, of keeping the studios in operation.

It is not unusual that a union should engage in the concerted activity of staying on the job in order to preserve

¹⁵Complainants were members of Locals 44, 80, 727 and 728 of the IATSE and the IATSE was their collective bargaining agent [R. 748-763, 766-770]. Like other organizations, unions act through their duly elected officers. The President of the IATSE issued written orders that members of the IATSE were to cross the picket lines [R. 763-764] and were to perform services in disregard of jurisdictional lines [R. 775]. He called a meeting of the IATSE group and directed the membership to perform any work which the producers asked be performed in order to keep the studios open [R. 223, 248, 538, 657-661]. He told them of his agreement with the producers to keep the studios open and to do the work necessary to that end [R. 223]. International Representative Brewer and Business Agent DuVal addressed meetings of IATSE members at Warner Bros. and other studios and advised them of the concerted action undertaken by the IATSE [R. 219-221, 224-225, 240, 249, 665, 687]. Virtually the entire membership of 10,000 concurred in this concerted activity [R. 667, 538-539].

itself. This situation occurs where rival unions are engaged in a jurisdictional dispute. If one union strikes for the purpose of compelling the employer to grant it jurisdiction over the employer's work to the exclusion of a rival union, the other union can save itself by joining with the employer in defeating the strike, and that is just what the IATSE did in this case. Finding itself in danger of destruction, it adopted its most potent weapon of defense—the maintaining of the studios in operation. If the studios were to remain in operation, the work abandoned by the strikers had to be performed. The IATSE undertook to perform that work, not because of any solicitude for the employer's welfare, but for the selfish purpose of preserving itself. It directed its members to join in the concerted activity which it undertook. Respondents, as they were required to do by the Act, dealt with the IATSE as the collective bargaining agent of members of the IATSE, including complainants. In defiance of their union's concerted activity, complainants engaged in their own personal and private form of activity which the Board has dignified by characterizing as a "strike." If such activity was a strike, it was at most a "wildcat" strike, in defiance of the concerted activity of complainants' own union.

NLRB v. Draper Corp. (4th Cir.), 145 F. 2d 199¹⁶ squarely holds that such "wildcat" strike activity is not protected by the Act. There the company was engaged in collective bargaining with a union which it had recognized as the collective bargaining agent of its employees. During the course of the negotiations a minority group of employees decided that negotiations were not going to their satisfaction and engaged in a strike. The strike was

¹⁶Cited with approval in *International Union v. Wisconsin Employment Relations Board*, 336 U. S. 245, 257, as an example of a type of concerted activity not protected by the Act.

not called or authorized or sanctioned by the union. The great majority of the employees continued at work. The question was whether the striking employees were engaged in a concerted activity protected by the Act. The Court, in a decision written by Judge Parker, held that the strikers' activity was not protected by the Act, saying:

"The question is narrowed, then, to whether what was done amounts to an unfair labor practice within section 8(1) of the act. This depends on whether or not the 'wild cat' strike, in which the discharged employees were engaged, falls within the protection of section 7 of the act. If it does, a discharge on account thereof would clearly be interference and coercion with respect thereto within the meaning of section 8(1). Cf. *Western Cartridge Co. v. N. L. R. B.*, *supra*. If it does not, the discharge and failure to re-employ would be justified and would furnish no basis for a finding of unfair labor practice.

"* * * we are of opinion that the 'wild cat' strike in which the employees were engaged and for which they were discharged was not such a concerted activity as falls within the protection of section 7 of the National Labor Relations Act, but a strike in violation of the purposes of the act by a minority group of employees in an effort to interfere with the collective bargaining by the duly authorized bargaining agent selected by all the employees. The purpose of the act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace. * * *

"It is perfectly clear not only that the 'wild cat' strike is a particularly harmful and demoralizing form of industrial strife and unrest, the necessary

effect of which is to burden and obstruct commerce, but also that it is necessarily destructive of that collective bargaining which it is the purpose of the act to promote. Even though the majority of the employees in an industry may have selected their bargaining agent and the agent may have been recognized by the employer, there can be no effective bargaining if small groups of employees are at liberty to ignore the bargaining agency thus set up, take particular matters into their own hands and deal independently with the employer. The whole purpose of the act is to give to the employees as a whole, through action of a majority, the right to bargain with the employer with respect to such matters as wages, hours and conditions of work. * * *

“A union selected as bargaining agent is thus made the exclusive representative of all the employees for the purpose of collective bargaining. As said in *Virginian R. Co. v. System Federation*, 300 U. S. 515, 548, 57 S. Ct. 592, 600, 81 L. Ed. 789, the law ‘imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other.’ See also *McQuay-Norris Mfg. Co. v. N. L. R. B.*, 7 Cir., 116 F. 2d 748; *Texarkana Bus Co. v. N. L. R. B.*, 8 Cir., 119 F. 2d 480, 484; *North Electric Mfg. Co. v. N. L. R. B.*, 6 Cir., 123 F. 2d 887, 890. The employees must act through the voice of the majority or the bargaining agent chosen by the majority. Minority groups must acquiesce in the action of the majority and the bargaining agent they have chosen; and, just as a minority has no right to enter into separate bargaining arrangements with the employer, so it has no right to take independent action to interfere with the course of bargaining which is being carried on by the duly

authorized bargaining agent chosen by the majority.

* * *

* * * * *

“* * * No surer way could be found to bring collective bargaining into general disrepute than to hold that ‘wild cat’ strikes are protected by the collective bargaining statute.”

The purpose of the Act is, by the use of the processes of collective bargaining, to prevent interruptions of interstate commerce. The processes of collective bargaining under the Act impose upon the employer “the duty of conferring and negotiating with the authorized representatives of its employees for the purpose of settling a labor dispute,” and “the negative duty to treat with no other.” (*NLRB v. Jones and Laughlin Steel Corp.*, 301 U. S. 1, 144.) To hold that a strike of a minority group in defiance of the concerted activity undertaken by its own collective bargaining agent is a concerted activity protected by the Act would defeat the very purpose for which the statute was enacted. How can interruption of interstate commerce be prevented if the employer treats with the collective bargaining agent in such manner as to prevent such interruption and if, at the same moment, a minority group can, under protection of the Act, engage in an activity designed to cause an interruption of such commerce? The employer is prohibited from making a settlement with the minority group in order to induce them to return to work. If the employer should do so, it might result in enabling the minority group to control working conditions to the detriment of the majority group. It would certainly undermine the power and influence of the

majority group as effectively as any anti-union course of action which an anti-union employer might conceive. Strikes by minority groups in defiance of the concerted activity of their collective bargaining agent do not fit within the pattern of the Act. Section 7 of the Act does not protect such activities.¹⁷ If the employer discharges or refuses reinstatement to employees because of such unprotected activities, he does not violate the Act. If he does not violate the Act, the Board is without authority to make any remedial orders against him.

Since the Board has found that respondents refused reinstatement to complainants because of their activity during the strike and since complainants' activity during the strike was in defiance of the concerted activity of their own union and was "wildcat" in nature and since such activity was not protected by the Act, respondents' refusal of reinstatement to complainants because of such activity was not a violation of the Act. In the absence of a violation of the Act, the Board is not empowered to order reinstatement of employees, with back pay.

¹⁷There are persons in this country whose purpose is to foster industrial chaos for the purpose of accomplishing fundamental changes in our form of government. The wild cat strike is a weapon well adapted to their purposes. Congress did not intend that strikes of that character should be protected by the Act. To the contrary, the purpose of Congress was to achieve industrial peace through the processes of collective bargaining conducted by the chosen representative of the employees.

3. If Complainants Were Engaged in a Strike, It Was a Strike in Violation of an Agreement Between Respondents and the IATSE That IATSE Members Would Stay on the Job and Perform Services as Directed. A Strike in Violation of a Union-Employer Agreement Is Not a Concerted Activity Protected by the Act.

The Board concedes that the IATSE agreed with the producers to supply the producers with labor to maintain studio operations and that, in accordance with that agreement, it instructed its membership to perform whatever duties might be assigned, regardless of whether such work had previously been performed by IATSE members or by employees on strike (Pet. Br. 5). The evidence showed not only that the President of the IATSE had made an agreement with the producers to keep the studios running [R. 223], but also that pursuant to that agreement, Roy M. Brewer, as International Representative of the IATSE, offered to have IATSE members do carpenter work and other work abandoned by the CSU strikers at Warner Bros. studio and that respondent Warner Bros. accepted that offer [R. 869-90; 216-26; 240-41]. Complainants were members of the IATSE and the IATSE was their collective bargaining agent. The refusal of some of complainants to perform carpenter work and painting work as directed, and the refusal of others to continue at work was a violation of the agreement made by the IATSE with the producers.

A strike or other refusal to work in violation of a collective bargaining agreement is not a concerted activity protected by Section 7 of the Act. In *NLRB v. Sands Mfg. Co.*, 306 U. S. 332, the collective bargaining agreement provided for departmental seniority. The union demanded that departmental seniority be disregarded and threatened a strike unless the employer complied with its demands. The employer closed its plant and refused to

engage in further negotiations with the union. Subsequently the employer reopened its plant with employees recruited from another union. The court regarded the activities of the employees in breach of the collective bargaining agreement as activities which were not protected by the Act, and held that the employer was justified in discharging the employees because of such activities. In *International Union v. Wisconsin Employment Relations Board*, 336 U. S. 245, 257, the court cites the *Sands* decision as an example of a type of concerted activity which is not protected by Section 7 of the Act. In accordance with the *Sands* decision, the Courts of Appeal and the Board have recognized that strikes in violation of collective bargaining agreements are not concerted activities protected by the Act. (*United Biscuit Co. v. NLRB* (7th Cir.), 128 F. 2d 771, 775; *Hazel-Atlas Glass Co. v. NLRB* (4th Cir.), 127 F. 2d 109, 118; *National Electric Products Corp.*, 80 NLRB 995, 999; *Fafnir Bearing Co.*, 73 NLRB 1008, 1011; *Joseph Dyson & Sons, Inc.*, 72 NLRB 445, 447.)

Since the Board has found that complainants engaged in a strike [R. 10] and that respondents refused reinstatement to complainants because of their activity during the strike, and since complainants' activity during the strike was in violation of the agreement made by their union with respondents and the other producers, such activity was not protected by the Act and respondents' refusal of reinstatement to complainants because of such activity was not a violation of the Act. In the absence of a violation of the Act the Board is not empowered to order reinstatement of employees, with back pay.

4. If Complainants Were Engaged in a Strike, It Was a Strike for the Purpose of Compelling Respondents to Commit an Unfair Labor Practice. A Strike for Such a Purpose Is Not a Concerted Activity Protected by the Act.

It is well settled that if an employer recognizes one of two competing unions during the pendency of a representation proceeding being conducted by the Board for the purpose of determining which of the two unions shall represent employees in an appropriate unit for purposes of collective bargaining, such employer is guilty of an unfair labor practice. The leading decision establishing this principle is *Midwest Piping & Supply Co., Inc.*, 63 NLRB 1060. There, after a representation proceeding had been instituted by the Board, the employer recognized and negotiated a contract with one of the two competing unions. In holding this to be an unfair labor practice the Board said, at page 1070:

“The record shows that both the Steamfitters and the Steelworkers had vigorously campaigned in the plant, had apprised the respondent of their conflicting majority representation claims, and *had filed with the Board conflicting petitions, which are still pending*, alleging the existence of a question concerning the representation of the employees covered by the agreement. Under such circumstances, the Congress has clothed the Board with the exclusive power to investigate and determine representatives for the purposes of collective bargaining. In the exercise of this power, the Board usually makes such determination, after a proper hearing and at a proper time, by permitting employees freely to select their bargaining representatives by secret ballot. *In this case, how-*

ever, the respondent elected to disregard the orderly representative procedure set up by the Board under the Act, for which both unions had theretofore petitioned the Board, and to arrogate to itself the resolution of the representation dispute against the Steelworkers and in favor of the Steamfitters. In our opinion such conduct by the respondent contravenes the letter and the spirit of the Act, and leads to those very labor disputes affecting commerce which the Board's administrative procedure is designed to prevent.

“We further find that the respondent's aforementioned conduct also constitutes a breach of its obligation of neutrality. As we have previously held, a neutral employer, on being confronted with conflicting representation claims by two rival unions, ‘would not negotiate a contract with one of them until its right to be recognized as the collective bargaining representative had been finally determined under the procedure set up under the Act.’ * * *.

“We are of the opinion and find that the respondent, by executing a ‘union shop’ agreement with the Steamfitters in the face of the representation proceedings pending before the Board, indicated its approval of the Steamfitters, accorded it unwarranted prestige, encouraged membership therein, discouraged membership in the Steelworkers, and thereby rendered unlawful assistance to the Steamfitters, which interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act.” (Italics added.)

The principle has been applied by the Board in other decisions in which; during the pendency of a representa-

tion proceeding, the employer either recognized or negotiated a contract with one of the two competing unions.¹⁸

The Supreme Court in *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267, has said, in affirming a Board order against an employer who actively favored one of two competing labor organizations:

“Once an employer has conferred *recognition* on a particular organization it has a marked advantage over any other in securing the adherence of employees.” (Italics added.)

The courts of appeal have uniformly enforced Board orders against employers who accord contrasting treatment to rival unions with regard to collective bargaining.¹⁹

Prior to the CSU strike, petitions had been filed with the Board, both by Local 1421 of the Painters Union, and by the employers requesting the Board to determine and certify the collective bargaining representative for Set Dressers. Section 9(c) of the Act in effect at that time provided that:

¹⁸*Precision Castings Co., Inc.*, 30 NLRB 221, 226; *Elastic Stop Nut Corp.*, 61 NLRB 694, 702, enforced *NLRB v. Elastic Stop Nut Corp.* (8th Cir.), 142 F. 2d 371, 380, cert. den. 323 U. S. 722; *Keystone Steel & Wire Co.*, 62 NLRB 683, 700; *John Engelhorn & Sons*, 42 NLRB 866, enforced (3rd Cir.) 134 F. 2d 553; *Phelps Dodge Copper Products Corp.*, 63 NLRB 686, 687.

¹⁹*Berkshire Knitting Mills v. NLRB* (3rd Cir.), 139 F. 2d 134, 139, cert. den. 332 U. S. 747; *NLRB v. Rock Hill Printing and Finishing Co.* (4th Cir.), 131 F. 2d 171, 174; *NLRB v. Southern Wood Preserving Co.* (5th Cir.), 135 F. 2d 606, 607; *Western Cartridge Co. v. NLRB* (7th Cir.), 134 F. 2d 240, 243, cert. den. 320 U. S. 746; *NLRB v. Idaho Refining Co.* (9th Cir.), 143 F. 2d 246, 248.

“Whenever a question affecting commerce arises concerning representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected.”

The Board had determined that a question affecting commerce concerning the representation of Set Dressers existed, for it had, commencing March 7, 1945, entered upon an investigation of that question by commencing the conducting of a hearing after due notice to the interested parties. Local 44 of the IATSE had intervened in that proceeding. Not only was there a question as to representation of Set Dressers, but there was also a question with respect to the appropriate unit in which Set Dressers should be included for purposes of collective bargaining. Local 1421 of the Painters Union contended that Set Dressers should be included in a unit consisting of Set Designers, Sketch Artists, Illustrators, Assistant Costume Designers, Costume Illustrators, and Model Builders. Local 44 of the IATSE claimed that Set Dressers should be included in a unit consisting of Property Men and the other classifications of employees represented by said Local 44 (61 NLRB 1030, 1035-36). Thus, there existed a real question with respect to the appropriate unit in which Set Dressers should be included and a real question as to whether Local 1421 of the Painters Union or Local 44 of the IATSE represented the employees in that appropriate unit. Under such circumstances if the producers, including respondents, had recognized Local 1421 of the Painters Union as the collective bargaining agent

of Set Dressers, they unquestionably would have been guilty of an unfair labor practice.²⁰

The Board concedes that the strike was called for the purpose of compelling the producers to recognize Local 1421 of the Painters Union as the collective bargaining agent of Set Dressers (Pet. Br. 5). The Trial Examiner refused to take official notice of the pendency of the representation proceeding involving Set Dressers, not because it was a matter outside the official knowledge of the Board, but because he regarded the fact of the pendency of the representation proceeding as immaterial [R. 144-145]. Exception was taken to the Trial Examiner's ruling. This is not a case in which respondents requested that the Board take official notice of matters found to be facts by the Board in an earlier proceeding in lieu of proof of those facts; *cf. NLRB v. Townsend* (9th Cir., September 11, 1950), 26 LRRM 2561. It is conceded that the propriety of using facts found by the Board in another proceeding as evidence in this proceeding would be doubtful, and respondents did not and do not request that judicial notice be taken of any facts found by the Board in any prior proceeding. Respondents do ask,

²⁰On May 7, 1945, during the course of the strike, the Board rendered its decision as to the appropriate unit and ordered an election (61 NLRB 1030). At the election, ballots were challenged by both of the contesting unions, and the Board ruled that both the strikers and the replacements were entitled to vote (64 NLRB 490). In making that ruling, the Board held that it was unnecessary to determine whether or not the producers would have engaged in an unfair labor practice had they recognized the striking union as the collective bargaining agent of Set Dressers, 64 NLRB 490, stating at page 511: "We find it unnecessary to decide whether or not it would have been an unfair labor practice had the producers granted recognition, the object sought by the Painters; * * *." In a subsequent decision, *Thompson Products, Inc.*, 70 NLRB 13, 17, the Board pointed out that its decision to permit strikers to vote in the *Columbia Pictures* case was not intended as a repudiation of the *Midwest Piping & Supply Company* principle.

however, that judicial notice be taken of the fact that there *was* a prior proceeding,—the fact, shown by the official records of the Board and read into the transcript in the hearing before the Trial Examiner, that there was pending before the Board on March 12, 1945, when the strike was called, a representation proceeding which was being conducted by the Board for the purpose of determining whether the striking union or the IATSE should be designated as the collective bargaining agent of Set Dressers. The pendency of that proceeding is a fact within the official knowledge of the Board.²¹ The pendency of that proceeding appears in the official reports of the Board's proceedings, printed by the United States Government, 61 NLRB 1030, and is a fact of which this Court may take judicial notice.²²

It is undisputed that the CSU strike was called for the purpose of compelling the producers to recognize Local 1421 of the Painters Union as the collective bargaining agent of Set Dressers; and that it was called in the midst of the representation hearing being conducted by the Board for the purpose of determining whether Local 1421 of the Painters Union or Local 44 of the IATSE should be designated as the collective bargaining agent of Set Dressers. Since it would have been an unfair labor practice for the producers to have recognized Local 1421 as

²¹In *Pittsburgh Plate Glass Co. v. NLRB*, 313 U. S. 146, 157, the Supreme Court held that the Board properly took official notice of what had occurred in a representation proceeding involving the same parties.

²²The courts will take judicial notice of the reports of U. S. commissions (*Greeson v. Imperial Irrigation District*, 9th Cir., 59 F. 2d 529, 531); of publications made by a department of the U. S. Government (*Atlantic Transport Co. v. Rosenberg Bros. & Co.*, 9th Cir., 34 F. 2d 843, 845); of opinions of the Secretary of Interior (*U. S. v. Brewer-Elliott Oil & Gas Co.*, D. C. Okla., 249 Fed. 609, 619); of reports of executive departments of the U. S. Government (*Tolfree v. Weitzler*, D. C. N. J., 22 F. 2d 214, 216); of public records (*Caha v. U. S.*, 152 U. S. 211, 221).

the collective bargaining agent of Set Dressers during the pendency of the representation hearing, the question here presented is whether a strike called for the purpose of compelling the producers to violate the National Labor Relations Act constitutes a concerted activity protected by the Act.

The answer to this question is obvious. A strike called for the purpose of compelling an employer to violate the Wage Stabilization Act is not a concerted activity protected by the Act (*American News Company*, 55 NLRB 302; *NLRB v. Indiana Desk Co.* (7th Cir.), 149 F. 2d 987). The *Indiana Desk Co.* case is one of the cases cited by the Supreme Court in *International Union v. Wisconsin Employment Relations Board*, 336 U. S. 245, 257, as an example of a concerted activity which is not protected by the Act. If a strike for the purpose of compelling an employer to violate the Wage Stabilization Act is not an activity protected by the Act, *a fortiori* a strike for the purpose of compelling an employer to violate the National Labor Relations Act is not a concerted activity protected by that Act. While the majority of the Board in *Columbia Pictures Corp.*, 64 NLRB 490, held that it was unnecessary, in passing upon the right of strikers to vote, to determine whether the producers would have committed an unfair labor practice had they recognized Local 1421 of the Painters Union during the pendency of the representation proceeding, one of the three members of the Board thought that the question of the validity of the strike should have been determined and in discussing this question he said, at page 527:

“This admission in the Painters’ brief reveals the avowed objective of the strike was to compel the Producers to commit an act which we have repeatedly held is an unfair labor practice in direct contravention of the purposes and provisions of the Act it is our

duty to administer. If we may not ignore strike attempts to compel violations of other Congressional legislation, it would seem absurd to deem a strike which had no other purpose than to bring about a violation of this very statute within the scope of the 'concerted activity' which Congress meant to protect."

The Board's decision which it seeks to have enforced refers to complainants as strikers. The evidence does not show that they actively participated in the strike, but since they acted in support of the strike, their unlawful concerted activity would no more be protected than the activity of the strikers who engaged in the picketing. In *Hazel-Atlas Glass Co. v. NLRB*, 127 F. 2d 109, six operators struck in violation of their union contract and the court held that under the *Sands* case, their strike activity was not protected by the Act. A foreman named Carder engaged in strike activity in sympathy with the strikers. The court, in holding that neither the strikers' nor Carder's activity was protected by the Act, said:

"Carder's discharge was justified on this ground, for certainly if the discharge of operators who have struck illegally, is justified, the discharge of one who refuses to work because the strike is on is also justified."

Since the Board has found that respondents refused reinstatement to complainants because of their activity during the strike, and since complainants' activity during the strike was in support of a strike which had as its purpose the compelling of respondents to commit an unfair labor practice, and since activities in support of such a strike are not protected by the Act, respondents' refusal of reinstatement to complainants because of such activity was not a violation of the Act. In the absence of a violation of the Act, the Board is not empowered to order reinstatement of employees, with back pay.

5. The Complainants Who Refused to Perform Services as Directed, While Continuing to Claim Rights as On-Payroll Employees, Were Not Engaged in Concerted Activities Protected by the Act.

After the CSU members had walked off their jobs in an attempt to force the producers, including respondents, to award one of their member unions the disputed jurisdiction over Set Dressers, most of the IATSE members then employed by the studios were directed by their employers to perform the work that had to be done to keep the studios operating. Some few of them, including most of the complainants, affirmatively refused to do that work in spite of the fact that their own union had agreed with the producers that its members would do such work and had ordered such members to perform the jobs vacated by strikers.

In failing to carry out such directions of their employers, complainants arrogated to their individual selves the right to determine what directions of their employers they would or would not obey. In effect, they demanded the right to continue as employees—of course, with the compensation of employees—while simultaneously refusing to perform the duties delegated to them by their employers and enjoined upon them by their own collective bargaining agent. Such a refusal resulted, as it should have, in the discharge of some and in others being told either to report to their union or to go home.²³

²³As recited in the Statement of the Case, Sapp, White, Stoica, Batchelder, Hand, Lora, Bonning, Gidlund, MacKellar, Rogers, De Sanctis, Lamb, Simpson and Jensen were discharged. Larson was directed to go home. Seward and Selgrath were directed to report to their local unions. All were replaced.

Respondents were clearly warranted in refusing reinstatement to such employees because of such insubordination. Such insubordination is not a concerted activity protected by the Act. In *NLRB v. Montgomery Ward & Co.* (8th Cir.), 157 F. 2d 486, the union employees at the Company's Chicago plant went on strike. Some Chicago orders were rerouted to the Kansas City branch. Three employees in the Billing Department of the Kansas City branch were asked to process Chicago orders. These employees were members of the union which was striking the Chicago plant and believed that by being asked to process the Chicago orders, they were being asked to do strikers' work. They failed to process the orders as directed by the Company. The Company told them they would have to process the Chicago orders. They refused and were discharged. The Board held that they were engaged in a concerted activity protected by the Act and ordered their reinstatement. The court refused to enforce the Board's order, saying at page 497:

“The Board was in error in holding that by refusing to process the Chicago orders these employees engaged in lawful assistance of their union, protected by Section 7 of the Act.”

In *United Biscuit Co. v. NLRB* (7th Cir.), 128 F. 2d 771, the Company's drivers and shippers were on strike. The Company employed men to replace them and continued to carry on its business. It had not theretofore been the duty of the Company's fifteen salesmen to ride on or follow the Company's delivery trucks. The Company's salesmen were members of the same union as were the striking drivers and shippers. The Company directed that its salesmen ride on or follow the Company's de-

livery trucks which were being operated by men employed to replace the striking drivers and shippers. The fifteen salesmen refused to work as directed. The Company discharged them, and the Board held that such discharge was in violation of the Act. The court held that the Board's order was not supported by the fact that the Company discharged the salesmen for refusing to ride on or follow the Company's delivery trucks as directed, but held there was other activity of the Company with respect to these employees which would support the Board's order.

In *Hazel-Atlas Glass Co. v. NLRB* (4th Cir.), 127 F. 2d 109, six operators were directed to clean their machines as a part of their duties. They struck in violation of their collective bargaining contract. Carder was a foreman and the Company directed him and two other foremen to operate the machines which the strikers had abandoned. When Carder refused, the Company discharged him. The Board held that such discharge was an interference with rights of Carder which were protected by the Act. The court refused to enforce the Board's order, saying:

"It cannot be that an employer is forbidden to discharge a foreman who aids an unlawful strike by refusing to obey the lawful orders of his master because the strike is in progress."

In *C. G. Conn, Ltd. v. NLRB* (7th Cir.), 108 F. 2d 390, the regular workweek of employees during the Christmas season had been about fifty-seven and one-half hours per week. Employees refused to work overtime as directed by the Company. The Company discharged them. The Board called these discharges "a tactical maneuver," and held that the employees were on strike and that the employer's refusal to reinstate them was an unfair labor practice. The court refused to enforce the Board's order, holding that the employees' activity was

not protected by the Act, and that the employer had the right to and did discharge the employees because of their insubordination.

In *Home Beneficial Life Insurance Co. v. NLRB* (4th Cir.), 159 F. 2d 280, cert. den., 332 U. S. 758, the employer discharged employees employed as insurance salesmen and collection agents because they refused to report to their offices each morning as required by their employer. The Board called the discharge "a tactical maneuver" and held that the employer's refusal to reinstate these employees was an unfair labor practice. The court refused to enforce the Board's order, holding that the employees' refusal to perform services as directed was not a concerted activity protected by the Act.

In the case at bar the Board has found that respondents discriminated against complainants because of their activities during the strike. The only activities carried on by the complainants who were discharged were their refusals to perform services as directed. Since these activities were not concerted activities protected by the Act, respondents' refusal to reinstate them because of such activities did not constitute a violation of the Act, and the Board is without power to order reinstatement with back pay with respect to such complainants.

6. **Since Complainant's Activities Were Not Protected by the Act, Respondents Were Privileged to Discharge or Refuse Reinstatement to Complainants Because of Such Unprotected Activities.**

It is elementary that, so far as the National Labor Relations Act is concerned, an employer has the right to discharge or refuse reinstatement to an employee for any reason or for no reason, except that he cannot discharge or refuse reinstatement to an employee because of the employee's exercise of rights guaranteed by the Act. In

NLRB v. Condenser Corp. (3rd Cir.), 128 F. 2d 67, 75, the court said:

“The Board does not dispute the contention that the employee may be discharged by the employer for a good reason, a poor reason, or no reason at all, so long as the terms of the statutes are not violated.”

See also:

NLRB v. Tex-O-Kan Flour Mills Co. (5th Cir.), 122 F. 2d 433, 438;

American Smelting Co. v. NLRB (8th Cir.), 126 F. 2d 680;

NLRB v. Williamson-Dickey Mfg. Co. (5th Cir.), 130 F. 2d 260;

NLRB v. West Ohio Gas Co. (6th Cir.), 172 F. 2d 685.

Since the activities of complainants in engaging in a wild cat strike, in violating the agreement made by their union with respondents, in joining in a strike for the purpose of coercing respondents into committing an unfair labor practice, and in refusing to perform services as directed, are not activities protected by the Act, there is nothing in the Act which prohibits respondents from discharging or refusing reinstatement to complainants because of such unprotected activities. Such conduct of complainants, not constituting concerted activities protected by the Act, is conduct which can properly be made the basis of discharge or refusal of reinstatement. It is not the function of the Board to police employers except to the extent that employers interfere with rights of employees which are guaranteed by the Act.

II.

Even if Respondents Had Agreed to Reinstate Complainants, Such Agreement Could Not Transform Into a Concerted Activity Protected by the Act, That Which Is Not a Concerted Activity Protected by the Act. The Board Is Not Empowered to Enforce Agreements; It Is Only Empowered to Remedy Infringements of Rights Protected by the Act.

It is abundantly clear for each of the reasons above stated that the activities of complainants were not activities protected by the Act and, hence, not within the province or power of the Board to affect by its order. The Board practically concedes this in its opinion and brief. It says, however, that because (as it erroneously construes the evidence) the respondents agreed to reinstate the complainants in spite of their admittedly unprotected acts, the Board becomes miraculously vested with the jurisdiction to protect such unprotected acts and to order the reinstatement of persons who, because of their activities in contravention of the policies expressed in the Act, would otherwise properly be denied any relief. Such a position is wholly without judicial precedent and, we submit, is indefensible as a matter of law.

The Board has construed the Cincinnati Directive not only as a directive that the members of the unions that engaged in the strike (the CSU unions) should return to work, but also as a directive that the members of the IATSE who refused to perform services as directed or who remained away from work should return to work. The Board found that respondents agreed to abide by the Directive. The Board's construction of the Cincinnati

Directive is erroneous, and there is no substantial evidence that respondents agreed to abide by the Directive. The conduct of respondents in refusing reinstatement to the insubordinate IATSE members indicates that there was no agreement to reinstate such IATSE members. However, even if it were to be assumed that the Board's construction of the Directive is correct and if it were to be assumed that there is substantial evidence supporting the Board's finding that the respondents agreed to abide by the Directive, nonetheless respondents' refusal to reemploy the insubordinate IATSE members was not an unfair labor practice because such IATSE members were not engaged in activities protected by the Act. The members of the Board closed their eyes and minds to the fact that in order to hold respondents guilty of a violation of the Act, they would be required to find that some right of complainants protected by Section 7 of the Act was interfered with, and the Board failed so to find. Instead, the Board's decision states:

"The crux of respondents' unlawful discrimination is the disparity between their treatment of the complainants and their treatment of the CSU strikers after having agreed to treat all alike. Accordingly, we find it unnecessary to decide herein whether or not, during the strike, the complainants were engaged in protected concerted activity." [R. 18.]

The members of the Board erred in that conclusion. The crux of the problem in this proceeding is that complainants engaged in activities which were not protected by the Act and were refused reemployment because they had engaged in such activities. The Act does not require respondents to accord all employees or former employees equal privileges with respect to reinstatement. The employer is free to discriminate between employees for any reason other than for the reason that the employees engaged in activities

which are protected by the Act. Discrimination because of unprotected activities of employees is not violative of the Act.

This proposition is well settled in a decision which is squarely in point. In *NLRB v. Fansteel Corp.*, 306 U. S. 250, the employees had engaged in a sit-down strike, a concerted activity which is not protected by the Act. At the conclusion of the strike, the employer reemployed some of the sit-down strikers but refused employment to others. The Board held that this discriminatory treatment of some of the sit-down strikers was a violation of the Act. The Supreme Court ruled to the contrary, holding that refusal of employment to employees because they engaged in a concerted activity not protected by the Act was not an unfair labor practice and that the employer was free to reemploy some sit-down strikers and to refuse reemployment to others. Referring to the fact that the employer reinstated "many," but not all of the sit-down strikers, the Court said, at page 259:

"The Board stresses the fact that, when respondent was able to obtain possession of its buildings and to resume operations, it offered reemployment to *many* of the men who had participated in the strike. The contention confuses what an employer may voluntarily and legally do in the exercise of his right of selection and what the Board is entitled to compel. * * *

"We find it unnecessary to consider in detail the respective contentions as to respondent's offer of reemployment, for we think that its action did not alter the unlawful character of the strike or respondent's rights in that aspect. The important point is that respondent stood absolved by the conduct of those engaged in the 'sit-down' from *any duty* to reemploy them, but respondent was nevertheless free to consider the exigencies of its business and to offer reemploy-

ment if it chose. In so doing it was simply exercising its normal right to select its employees.” (Italics added.)

The Court of Appeals in *Wilson & Co. v. NLRB* (7th Cir.), 120 F. 2d 913, reached the same conclusion, stating with respect to the fact that the employer reemployed some sit-down strikers and refused reemployment to others:

“It therefore appears that there is little, if any, room for argument but that petitioner was within its rights in its position that it be accorded the privilege of selecting from those guilty of violence, the ones which it would reinstate.”

The situation is no different in the case at bar. Here, claimants were engaged in activities which were not protected by the Act and respondents refused them reemployment because of such activities. The fact that respondents reemployed others who engaged in such activities is immaterial. Respondents did not refuse reemployment to complainants because they had engaged in any activity *protected* by the Act; respondents refused reemployment to them because they had engaged in *unprotected* activities.

Petitioner's unsound conclusion that respondents agreed to reemploy all strikers does not bolster its case. If complainants were engaged in activities which were not protected by the Act, those activities did not become protected simply because respondents made a purported agreement to reemploy complainants as well as the CSU strikers. If respondents had made such an agreement it would have been a breach of the agreement to have failed to reemploy complainants. However, a breach of such an agreement is not an unfair labor practice. An unfair labor practice occurs only when the employer violates some right guaranteed by the Act. Complainants' activities were not protected by the Act and respondents' refusal of employment

to complainants because they engaged in such activities cannot be made a violation of the Act by virtue of some agreement.

The decisions cited by petitioner in support of its contention do not support the contention. In *NLRB v. Aladdin Industries, Inc.* (7th Cir.), 125 F. 2d 377, the Board sought to have enforced an order which had two separate provisions. One provision of the order required the employer to cease and desist violating the Act by questioning its employees concerning their union activity; by seeking to establish an independent union in opposition to the complaining union; and by circularizing its employees with a letter attacking the complaining union. The other provision of the order required the employer to cease and desist violating the Act by discriminatorily refusing to reinstate ten union employees following a strike, thereby discouraging membership in the union. The Board's findings upon which it based a violation of the Act by questioning its employees, etc., as above described, were with respect to incidents which occurred prior to March 25, 1937, when the employer offered to accept applications for employment from sit-down strikers. The Board's findings upon which it based a violation of the Act by refusing reinstatement to ten employees were that such reinstatement was denied "because they had applied for employment through the union and thus indicated a partisan adherence to said union."

The evidence showed that on March 25, 1937, the Company offered to receive applications for employment upon forms furnished by the Company with the understanding that such applications would be considered upon the basis of the qualifications of the employees for the job opportunities which were available. The ten complainants who were refused reinstatement and whom the Board ordered reinstated, made applications through the union instead of upon the forms furnished by

the Company, and the Company refused to reinstate them. Unlike the case at bar, the employer in the *Aladdin* case did not refuse reinstatement because of the fact that the employees had engaged in activities unprotected by the Act (*i. e.*, in a sit-down strike). The employer there did not even contend and the Board did not find that participation in the sit-down strike was the reason for refusing these ten employees reinstatement (22 NLRB 1195, 1220). (In the case at bar the Board has found that respondents refused reinstatement to complainants because they engaged in activities which are clearly outside the protection of the Act.) Instead, in the *Aladdin* case, the Board found that “the employer denied reinstatement to these ten employees because they had applied for employment through the union and thus indicated a partisan adherence to said union” (*NLRB v. Aladdin Industries, Inc.*, *supra*, p. 384; 22 NLRB 1195, 1224-1232), and the court held that “The finding of the Board that they were not reemployed because their applications were made through the union must be sustained.” (P. 386.)

Thus, with respect to reinstatement of the ten employees who were discriminated against because of their partisan adherence to the union (and not because they had engaged in a sit-down strike), there was no question of “condonation” or “waiver.” The *Aladdin* case thus does not support the Board’s anomalous theory that by “condonation” or “waiver,” an employer can transform an activity which is not protected by the Act into an activity protected by the Act. Such a proposition was not even involved in that case. The language which petitioner quotes in its brief (Pet. Br., 26) was addressed to the question of whether the court should enforce the Board’s order with respect to unfair labor practices in violation of Section 8(1) of the Act which occurred prior to the date when the employer offered to accept applications for reinstatement from the members of

the union that had called the sit-down strike. The court refused to enforce that portion of the Board's order, stating that it believed that the employer's offer to receive applications for reinstatement and the acceptance of that offer by the employees constituted the turning over of a new leaf and that grievances antedating that treaty of peace were waived, both by the employer and by the employees. What the court would have ruled had the employer sought to refuse employment to sit-down strikers because of the fact that they had engaged in such an illegal activity was not decided.

As a matter of fact, when the *Aladdin* case was before the Board there were, in addition to the ten employees, some sixty-three employees that had been discharged by the Company because of their participation in the sit-down strike. They were complainants and sought reinstatement. The Board held that they were not entitled to reinstatement and dismissed the complaint as against them (22 NLRB 1195, 1221). The Board did not hold that the employer "condoned" or "waived" the illegal activity of these employees by offering to accept applications for reinstatement and that thereby their unprotected concerted activity became a protected concerted activity. It seemed to recognize, at that time, that activities unprotected by the Act could not be transformed into activities protected by the Act simply by the mere fact that the employer subsequently made an agreement to reinstate all employees.

The Board has also cited *Stewart Diecasting Corp. v. NLRB* (7th Cir.), 114 F. 2d 849, in support of its contention that an agreement to reinstate employees has the effect of transforming unprotected activities into protected activities. The decision in that case does not support the Board's contention. There, between 75 and 100 out of a total of 685 employees engaged in a sit-down strike on March 17, 1937. It lasted for only twenty-four hours.

The employer closed the plant but did not discharge the sit-down strikers. On March 23, 1937, after the sit-down strike had terminated, the union representing the majority of the employees requested recognition. The employer refused such recognition. The union then called a conventional strike because of such refusal of recognition. Thereafter the employer reopened its plant and filled the jobs of some of the strikers. On June 24, 1937, the strike was settled upon the agreement of the employer to reinstate strikers if and when vacancies occurred. The employer refused to discharge the replacements theretofore hired, and therefore there were not jobs for all of the strikers and the employer refused reinstatement to some of them. The Board held that the conventional strike called by the union was caused by the employer's unfair labor practice of refusing to recognize the union; that the employer was required to create vacancies by discharging employees hired since that date, and that the refusal of the employer to reinstate the strikers was an unfair labor practice.

Unlike in the case at bar, the employer in the *Stewart Diecasting* case did not refuse reinstatement to the employees because they had engaged in activities not protected by the Act (*i. e.*, in a sit-down strike). The Board said in its decision that "No contention was made by the respondent at the hearing that any of the striking employees were discharged or refused reinstatement at any time because of their participation in the sit-down strike." (14 NLRB 872, 896.) The record did not even show (with the exception of twelve or fourteen Board witnesses who admitted that they participated in the sit-down strike) which of the employees who were refused reinstatement had participated in the sit-down strike. (*Stewart Die-*

casting case, p. 856.) All of the employees who were refused reinstatement were members of the union and had participated in the conventional strike which followed the employer's refusal to recognize the union. The Board held that the employer had refused them reinstatement "because of their membership in, and activity on behalf of, the union." (P. 851.) Thus, the question of whether an employer who has agreed to reinstate all strikers can lawfully refuse reinstatement to some because they engaged in unprotected activities was not presented in the *Stewart Diecasting* case.

Hazel-Atlas Glass Co. v. NLRB (4th Cir.), 127 F. 2d 109, instead of supporting petitioner's contention, actually supports respondents' contention. There six employees went out on a strike in violation of their collective bargaining agreement. Under the *Sands* case their strike was not a concerted activity protected by the Act. A foreman named Carder, when asked to perform work abandoned by the strikers, refused to do so and joined in the strike activity. Subsequently, the employer reinstated the six employees but refused reinstatement to Carder. The Board held that this discriminatory treatment of Carder was a violation of the Act but the court, upon rehearing held that the activities of the six employees and of Carder were not protected by the Act, in view of the *Sands* case, and that the refusal of the employer to accord the same privilege of reinstatement to Carder as was accorded to the six employees was not a violation of the Act. The language from the *Hazel-Atlas* decision which petitioner quotes at page 27 of its brief to the effect that strikers are "entitled to even handed treatment" is *dictum* and read in the background of the whole decision was simply an obser-

vation that strikers who are engaged in concerted activities *protected* by the Act are entitled to even handed treatment and that the employer cannot discriminate against one of them because he engaged in a concerted activity which is *protected* by the Act. The *decision* in the *Hazel-Atlas* case is consistent with the Supreme Court's decision in the *Fansteel* case and supports our contention that where employees engage in activities which are *not* protected by the Act, the employer can reinstate some of such employees and refuse employment to others because of such unprotected concerted activities without violating the Act.

In *NLRB v. Mt. Clemens Pottery Co.* (6th Cir.), 147 F. 2d 262, cited by petitioner in support of its contention, the Board had refused reinstatement to an employee that had been convicted of malicious destruction of property during a strike, but had ordered reinstatement of an employee who had been convicted of assault and battery during the same strike. The court held that violence during a strike is not a concerted activity protected by the Act, and refused to enforce the Board's order to reinstate the employee who had been convicted of assault and battery. The employer contended that the violence during the strike absolved it of the obligation to reinstate any of the strikers. The court held, with respect to this contention, that:

"The violence of these two employees, so clearly established by their conviction, is not, however, to be imputed to other union members in the absence of proof that identifies others as participating in such violence."
(p. 268.)

The court inferred that if any of the other strikers whose reinstatement had been ordered could be proved to

have been guilty of violence during the strike, the court would have refused to enforce the order for their reinstatement. However, it stated in passing and by way of *obiter dictum* that many employees who had been *charged* with violence (but not convicted) had been taken back by the employer and that "to some extent, at least, their violence was condoned." This is a far cry from holding that an employer can, by entering into an agreement, make an unfair labor practice out of that which is not an unfair labor practice.

If, as we contend, the activity of complainants during the strike was not an activity protected by the Act, and if, as the Board has found, respondents refused reinstatement to complainants because of such unprotected activities, then even if respondents had agreed to take back claimants at the end of the CSU strike (which is denied), respondents' failure to carry out the purported agreement would not transform unprotected activities into protected activities. The power of the Board is limited to remedying unfair labor practices. If complainants' activities were not protected by the Act and if respondents' refusal to reinstate complainants because of such activities was not an unfair labor practice, then the Board is without power or jurisdiction to make an order against respondents simply because they made a purported agreement and did not carry it out. The Board has no right to usurp the functions of the judiciary and to arrogate to itself the power to impose sanctions for breach of a purported agreement. Complainants' remedy for breach of a purported agreement is in an ordinary civil action.

III.

In Any Event the Board's Finding That Respondents Agreed to Reinstate Complainants Is Not Supported by Substantial Evidence; Such Evidence as There Is Shows That No Such Agreement Was Made.

1. The Evidence With Respect to the Issuance of the Cincinnati Directive and With Respect to What Respondents Agreed to Do in Applying the Directive Is Hearsay and Therefore Is Not Reliable, Probative, and Substantial Evidence. But if Such Evidence Is to Be Given Credence, It Affirmatively Shows, Without Contradiction, That Respondents Did Not Agree to Reinstate Complainants.

The Trial Examiner found that while the strike was in progress between October 15 and 24, 1945, the Executive Council of the American Federation of Labor met at Cincinnati and issued a directive [R. 158]. The Trial Examiner thereafter referred to the directive as the "Cincinnati Directive" [R. 160, 163, 164]. A copy of the Directive was recited in the decision of Felix H. Knight, W. C. Birthright and W. C. Doherty, as the Executive Council Committee of the American Federation of Labor, appointed to settle the Hollywood jurisdictional controversy pursuant to the terms of said Directive [R. 731-745]. In its decision the Board referred to the Cincinnati Directive as the "Cincinnati Agreement" and found that respondents had "accepted" the Directive [R. 12] and had "obligated" themselves and had "agreed" to reinstate all striking employees, including complainants whom it referred to as "strikers" [R. 10]. In its brief petitioner asserts that the "parties" (apparently intending to include respondents) "agreed to submit the dispute to the Executive Council of the American Federation of Labor" (Pet. Br. 6-7) and refers to respondents as "binding themselves to the terms

of the Cincinnati Agreement" [R. 11] and as "committing themselves to the terms of the Cincinnati Agreement" [R. 13 and 10]. There is no substantial evidence that respondents agreed to submit the dispute to the Executive Council of the American Federation of Labor or that respondents accepted or agreed to the terms of the Cincinnati Directive or obligated themselves to or agreed to reinstate complainants or bound or committed themselves to abide by the Cincinnati Directive.

None of the evidence with respect to the Cincinnati Directive meets the standards prescribed by Section 7(c) of the Administrative Procedure Act (60 Stat. 237, 5 USC 1001, *et seq.*). Section 7(c) of that Act provides, in part, as follows:

"* * * no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the *reliable, probative and substantive* evidence." (Italics added.)

All of the testimony with respect to the Cincinnati Directive is hearsay. No witness was called that had any personal knowledge of the fact of the issuance of the Directive, and no witness was called that had any personal knowledge of what the producers' representative in Cincinnati, Mr. Eric Johnston, obligated respondents to do with respect to the Directive. The Directive itself was admitted in evidence as a part of the decision of the Executive Council Committee in which Felix H. Knight, W. C. Birthright and W. C. Doherty made the unsworn assertion, as members of that Committee, that the Executive Council had "handed down" the Directive recited in that decision [R. 731-745]. The decision of the Executive Council Committee was admitted in evidence [R. 342], and thus the Directive became a part of the record in this

proceeding by way of the hearsay statements of Messrs. Knight, Birthright and Doherty found in the decision of the Executive Council Committee. The Directive provides that "the parties concerned" (naming the *unions* that were contesting for jurisdiction) should accept the decision of the Executive Council Committee "as final and binding." The decision contains the unsworn recital that "All parties agreed to accept the decision of the committee and to be bound thereby" and the word "parties," as used in the decision clearly refers to the "parties" referred to in the Directive; *i. e.*, the unions [R. 732].

All of the sworn testimony with respect to the Directive was given by B. C. DuVal, Business Agent of Local 44 of the IATSE, and Roy M. Brewer, International Representative of the IATSE. Neither Mr. DuVal nor Mr. Brewer was in Cincinnati at the time of the issuance of the Directive, and all of their testimony is based upon what Richard F. Walsh, President of the IATSE, had told them [R. 557, 682]. Such hearsay testimony does not meet the standards prescribed by the Administrative Procedures Act. In referring to the standards of evidence required by that Act, the Court of Appeals for the Sixth Circuit, in *Pittsburgh S. S. Co. v. NLRB*, 180 F. 2d 731, 733 (cert. granted, 70 S. Ct. 842), said:

"These standards were designed to eliminate the wholesale use of hearsay, the drawing of expert inferences not based upon evidence, and the consideration of only one part or one side of the case."

When the burden of proof is upon the employer, the Board refuses to accept hearsay testimony (*Ohio Associated Telephone Co.* (Oct. 16, 1950), 91 NLRB No. 162, 26 LRRM 1599). The Board should be required to apply the same standard where the burden of proof is upon the Board.

Upon the basis of what Mr. Walsh told Mr. DuVal, the Record shows that Mr. DuVal identified Board's Exhibit No. 17 (which it was stipulated was identical with the Directive quoted in Board's Exhibit No. 8) as "the Directive that was issued by the American Federation of Labor Council in Cincinnati" [R. 557, 571, 731-32]. Upon the basis of what Mr. Walsh told him, Mr. Brewer testified that the Directive "was a Directive which was issued by the Council which was accepted by the *unions* involved" [R. 668]. Based upon what Mr. Walsh told him, Mr. Brewer testified that Mr. Eric Johnston was present in Cincinnati representing the major motion picture producers, including respondents [R. 683]. There was no testimony whatsoever, hearsay or otherwise, that Mr. Johnston or any other representative of respondents had agreed to submit the dispute to the Executive Council or had agreed to abide by any directive issued by the Executive Council.

The only testimony with respect to any understanding concerning the application to be made of the Cincinnati Directive is the hearsay testimony given by Mr. DuVal and Mr. Brewer based upon what Mr. Walsh had told them. Mr. DuVal did not testify that the *producers* had made any agreement, but he did testify that there was "an understanding" without attempting to state who the parties were to that understanding. He testified that whenever he used the word "strikers" he meant the members of the CSU [R. 560] and that "There was an understanding that those that were on strike [the CSU strikers] were to return to work on a certain date, and that those that were in there filling the jobs were to stay on the job for a period of sixty days, until this Directive could be carried out" [R. 558]. He further testified that he was told that a dispute arose as to whether the replacements hired to take the places of the CSU strikers could stay on the job [R. 558]; that Mr. Johnston and others met

with the Executive Council in Washington [R. 558]; that the Executive Council directed that both the replacements and the CSU strikers should be continued on the payroll [R. 563-564], and that Mr. Johnston and Mr. Hutcheson, who was President of the Carpenters Union, had agreed that the producers would not work the IATSE replacements alongside the CSU strikers [R. 558-560, 570]. (It should be noted that the purported agreement between Mr. Johnston and Mr. Hutcheson was not an agreement to abide by the Directive or to return the insubordinate IATSE members to work.) If this hearsay testimony can be regarded as "reliable, probative and substantial evidence" that the producers made an agreement with respect to the application of the Directive, it is not evidence that the producers agreed to return the insubordinate IATSE members to work.

Mr. Brewer testified, by way of hearsay, that he was told by Mr. Walsh [R. 682] that there was no understanding that the insubordinate IATSE members were to be reinstated to their jobs [R. 684]. He further testified that he issued instructions that such IATSE members "were not to be recognized as having any right to reinstatement on jobs which they had failed to fill when they had been requested to do so by the union" [R. 685].

If the conduct of the producers is looked to for the purpose of ascertaining what agreement was made by them with respect to the application of the Directive, the evidence is uncontradicted that respondents returned the CSU strikers to work [R. 565, 671] and that none of the insubordinate IATSE members was returned to work except three Pattern Makers at Warner Bros. (Schnell,

Horner and DeSanctis) in job vacancies which none of the other complainants was qualified to fill, and one Grip at Loew's (Selgrath) in a job vacancy which had occurred there of a lower classification than the job held by Selgrath at the time of the strike. The very issuance of Mr. Pelton's instructions, pursuant to orders of the Producers Labor Committee, that the insubordinate IATSE members should not be returned to work except with approval of their IATSE Locals, is indicative that the producers had not agreed to reinstate such IATSE members. The IATSE had furnished respondents with IATSE members to take the places of those that had refused to perform services as directed during the strike. The IATSE took the position it had furnished employees to fill the jobs of complainants when it was difficult to get men to do the work and that it would not agree to the displacement of those employees [R. 684]. There was no reason why respondents should employ two men for those jobs. Why not toss the problem into the lap of the IATSE? Mr. Pelton's memorandum makes it clear that respondents were attempting to avoid controversy with the IATSE by placing upon the IATSE the responsibility, under its closed shop agreement [R. 748-755], of determining whether the IATSE replacements or the IATSE "bolters" should perform IATSE jobs.

That the respondents had not at Cincinnati agreed to reinstate complainants is the fair and logical conclusion from the fact that the Cincinnati meeting was called, as petitioner concedes, for the purpose of settling the *CSU strike* (Pet. Br. 6); that following the Cincinnati meeting the CSU strikers were reinstated and complainants were not; and that on the very day that the CSU strikers

were reinstated, instructions were issued by Mr. Pelton that complainants, who were IATSE members, were not to be reinstated with the CSU strikers [R. 747].

The sketchy character of the proof with respect to the Cincinnati Directive and the total absence of any evidence that the producers had agreed to reinstate the insubordinate IATSE members is explainable. There is nothing in the Record to indicate that at the time of the hearing the Board had any theory that the producers had agreed to reinstate the insubordinate IATSE members, and that thereby the producers had transformed unprotected concerted activities into protected concerted activities. At the time of the hearing it was the Board's theory that the IATSE members who had refused to perform services as directed and had been discharged were actually discharged; that such discharge was an unfair labor practice; and that the IATSE members who had gone home or failed to report for work during the strike were refused reinstatement because they had engaged in concerted activities which were protected by the Act. Mr. DuVal and Mr. Brewer were interrogated with respect to the Cincinnati Directive because the Board had charged respondents with violating the Act by paying bonuses to the employees who did the strikers' work [R. 158]. By referring to the Cincinnati Directive, Mr. DuVal and Mr. Brewer explained why the IATSE replacements of the CSU strikers received sixty days' pay even though they did not work during the sixty days, and why certain other IATSE members who temporarily worked outside of IATSE jurisdiction, received \$3.50 per day for each day during which they so worked [R. 158-165]. These payments were held by the Trial Examiner and

by the Board not to constitute unfair labor practices [R. 165, 24]. Under the Board's theory at the time of the hearing, the question of whether the producers had made any agreement with respect to reinstatement of the insubordinate IATSE members was not an issue, and there was therefore no occasion to call witnesses who were present in Cincinnati and who could give competent testimony as to what the producers had agreed to do with respect to the Directive which was issued by the Executive Council of the American Federation of Labor. The Trial Examiner, in his Intermediate Report, followed the Board's theory at the hearing; he did not contend that respondents had agreed to reinstate the IATSE members [R. 146-156]. The theory upon which the Board rendered its decision, appeared for the first time in its decision rendered almost three years after the filing of the complaint against respondents and almost two years after the filing of the Trial Examiner's Intermediate Report.

Respondents respectfully contend that the question of what the producers agreed to do with respect to the Cincinnati Directive is not material because, even if any agreement had been made to reinstate the insubordinate IATSE members at the same time the CSU strikers were reinstated, such agreement could not transform that which is not a concerted activity protected by the Act into a concerted activity protected by the Act. But if the Court should disagree with respondents as to the materiality of that question, nevertheless the Court is not bound by the Board's finding, which is not supported by any evidence, that there was an agreement by respondents to reinstate complainants. All of the evidence points to a conclusion contrary to that reached by the Board and this finding, we submit, and the Board's conclusion based thereon should be rejected by this Court.

2. Even if There Were Reliable, Probative, and Substantial Evidence That Respondents Agreed to Carry Out the Provisions of the Cincinnati Directive, Such Evidence Would Not Support a Finding That Respondents Agreed to Reinstate Complainants.
- a. READ IN THE LIGHT OF THE UNCONTRADICTED EVIDENCE WITH RESPECT TO THE CIRCUMSTANCES SURROUNDING ITS ISSUANCE, THE DIRECTIVE REFERRED ONLY TO THE RETURN OF THE STRIKING CSU MEMBERS. COMPLAINANTS WERE NOT CSU MEMBERS BUT MEMBERS OF THE IATSE.

The Cincinnati Directive issued by the Executive Council of the American Federation of Labor provided "That all employees return to work immediately" [R. 731]. The words "all employees" must be read in the light of the uncontradicted evidence of the circumstances in which they were used. What was the situation? A CSU union had called a strike and established picket lines [R. 527, 586, 333]. The other CSU unions had joined in the strike. They had not only respected the picket lines; they had joined in the picketing [R. 587, 334-335]. The IATSE had furnished replacements for the members of the CSU who had gone out on strike so that in October, 1945, the IATSE was representing employees both in the job classifications formerly within the jurisdiction of the IATSE and in the job classifications formerly within the jurisdiction of the striking unions. The Executive Council of the American Federation of Labor decided to end the strike and, to accomplish that, it had to provide machinery for determining which of the two competing confederations of unions (the CSU and the IATSE) should have jurisdiction over the various types of studio work and had to provide that each of the competing confederations of unions should give up such work as was awarded to the other confederation of unions. The Cincinnati

Directive provided that these determinations were to be made by an Executive Council Committee within sixty days after the date of the Directive. The Directive contemplated that during the sixty-day period, the producers were to employ two employees for every CSU striker's job and that when jurisdiction of the strikers' jobs had been determined at the end of the sixty-day period, the employee who was a member of the union which was awarded jurisdiction of that job would be continued on, and the employee who was a member of the union that lost jurisdiction of that job would be dropped. Thus, the Directive contemplated that all CSU strikers would return.

Complainants were in a different category. They were IATSE members who had either been discharged or had gone home or had failed to report for work. Other IATSE members had been employed to perform complainants' jobs. There was no question between complainants and the IATSE members employed in their jobs as to what union had jurisdiction over those jobs. They were IATSE jobs. There was not the slightest reason for employing two men for each of those jobs for a period of sixty days. (As pointed out above, where a CSU union and an IATSE union were competing for jurisdiction over a job, there was a valid reason for employing both a CSU member and an IATSE member in that job during the sixty-day period when jurisdiction was being determined.) Nothing decided by the Executive Council of the American Federation of Labor would determine which of the two IATSE members was entitled to the IATSE job. It did not make sense to employ two IATSE members for each of these IATSE jobs. The Directive should be construed so as to make sense. By providing that "all employees" were to return to work immediately, the Executive Council was referring to those

employees who were members of the striking unions and who had gone out on strike.

The Board, by distorting the facts and ignoring the uncontradicted evidence, has concluded that complainants were “strikers” who “should be treated no differently, in view of the Cincinnati Agreement, than the other strikers” [R. 10; Pet. Br. 6]. But even the Board recognizes that it was not complainants’ dispute but the CSU strike which was settled in Cincinnati (Pet Br. 6; R. 11]. The Cincinnati Directive, therefore, had reference to the CSU strikers and had nothing to do with complainants’ dispute with their employers and their defection from the concerted action of their union.

The Cincinnati Directive is before the Court [R. 731-732]. The evidence (such as it is) as to the circumstances under which it was issued by the Executive Council of the American Federation of Labor is uncontradicted. The Board was in no better position to interpret this instrument than is the Court. The meaning of the Directive is not a question of fact, but is a question of law. (*Aluminum Company of America v. NLRB* (7th Cir.), 159 F. 2d 523, 525.) The Court is not bound by the Board’s interpretation of this written instrument. It should interpret the instrument so that it will carry out the plain intention of the Executive Council of the American Federation of Labor which issued the Directive.

b. THE DIRECTIVE REFERRED ONLY TO STRIKERS.
COMPLAINANTS WERE NOT STRIKERS.

Petitioner construes the words “all employees” in the Cincinnati Directive as follows:

“* * * the term ‘all employees’ meant all strikers who had been ‘on call’ on March 12, 1945, the date of the inception of the strike * * *.” (Pet. Br. 23.)

Petitioner says that the Cincinnati Directive "provided for the reinstatement of all strikers." (Pet. Br. 21, 22.)²⁴

The evidence is uncontradicted that the fourteen Warner Bros. employees who were discharged and the two Columbia employees who were discharged were not strikers. They were discharged before they left the studios. They did not walk out. They were fired. Petitioner says that the discharge was not a discharge but was a "tactical maneuver." It is a mere *ipse dixit* for the Board to declare that a discharge is not a discharge just because such a declaration suits its purposes.²⁵ As pointed out in the Statement of the Case, the Board's complaint alleges that these employees were discharged; the hearing before the Trial Examiner was conducted on that theory; the employees understood that they had been discharged. Some of the Warner Bros. employees immediately returned to work and performed services as directed. Since the bookkeeping operation of removing their names from the payroll had not been completed at the time of their return, their discharge was simply cancelled and they were reinstated as employees [R. 637]. Those, however, who did not immediately return to work remained in the status of

²⁴It is our contention that the Cincinnati Directive applied only to the CSU strikers, but even taking the Board's construction of the Directive, it is inapplicable to complainants.

²⁵In this the Board is not unlike Humpty Dumpty in the following passage from "Through the Looking-Glass and What Alice Found There":

" 'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'

" 'The question is,' said Alice, 'whether you *can* make words mean so many different things.'

" 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.' "

discharged employees [R. 634]. A few of the discharged employees were reemployed, two just prior to the end of the strike, and one just after the end of the strike, and when they were reemployed they were treated as new employees. Their discharge was not waived. To say that they were not discharged is to disregard the uncontradicted evidence. If they were discharged before they left the studios, as the evidence shows, then they were not strikers and if they were not strikers, then even under petitioner's interpretation of the Cincinnati Directive, they did not fall within the definition of the words "all employees" as used in that Directive.

With respect to the seven employees who were either told to report to their Locals or who went home or who failed to report for work, the evidence does not support the finding of the Board that they were strikers. The strike was called by Local 1421 of the Painters Union, and the members of the other CSU unions joined in the strike by ceasing work and engaging in the picketing. These seven employees adopted an entirely different course of conduct. Larson, who refused to perform work as directed and was told to "go home," testified "I wasn't striking, with the exception that I wouldn't go through the picket line" [R. 301; 297]. There is no evidence that Seward, who refused to perform services as directed and was told to "go see your Local," joined in the strike [R. 497]. There is no evidence that Selgrath, who refused to perform services as directed and was told "to report to Mr. Barrett at Local 80," joined in the strike [R. 393]. He testified, "I agreed that I would go home and stay until it was over" [R. 399]. Groth, who refused

to perform services as directed, testified that he told his employer "I just believed I would go home" [R. 383], and that he then left the studio [R. 387]. There was no evidence that he engaged in the strike. Goudie testified that on March 12, 1945, "I went to the studio, and they had a picket line across the entrance so I didn't go through" [R. 290]. There was no evidence that he engaged in the strike. Howe testified that on March 12, 1945, he appeared at the studio but did not go in [R. 449]. He said "I quit my job" [R. 462]. Coffey testified that he did not go to work on March 12, 1945, or thereafter during the strike because he was observing the picket line [R. 468]. There was no evidence that he joined in the strike. Stanley testified that he worked during the strike until the first of October, and that he stopped about that time [R. 508], and stayed out for the balance of the strike [R. 509]. There was no evidence that he became a striker.

That these seven employees did not engage in a strike is clear from the accepted definitions of the word "strike." In *Molders' Union v. Allis Chalmers Co.* (7th Cir.), 166 Fed. 45, 52, the court defined a strike as follows: "A strike is a cessation of work by employees in an effort to get for the employees more desirable terms."²⁶ It might be argued that these seven employees were engaged in some form of concerted activity (though the

²⁶This case was cited with approval in *Jeffery-DeWitt Insulator Co. v. NLRB* (7th Cir.), 91 F. 2d 134, 137; cert. denied 302 U. S. 731. See also *C. G. Conn, Ltd. v. NLRB* (7th Cir.), 108 F. 2d 390, 396-397; *Farmers Loan & Trust Co. v. Northern Pac. R. Co.*, 60 Fed. 803, 819; Restatement of Torts, Sec. 797.

evidence indicated that their activity was individual rather than concerted), but the evidence is clear that their purported “concerted activity” was not the activity of being “strikers.”²⁷ The strikers were the CSU employees that joined with the members of Local 1421 of the Painters Union in their attempt to compel respondents to recognize Local 1421 as the collective bargaining agent of Set Dressers.

The evidence, therefore, does not support a finding that complainants were strikers. Consequently, even if there were evidence that respondents had agreed to abide by the Cincinnati Directive, such agreement would not have obligated respondents to reinstate complainants because, as the Board admits, the Directive applies only to strikers and complainants were not strikers. Hence, upon the Board’s own interpretation of the Directive, there is no support in the record for the Board’s order requiring reinstatement of complainants with back pay.

At all events, however, the Board’s theory upon which its petitions for enforcement of its order depends upon a purported *agreement* made by respondents to abide by the Directive. Section 10(c) of the Act provides that the findings of the Board must be supported by “the preponderance of the testimony” and Section 7(c) of the Administrative Procedures Act prescribes that the evidence must be “reliable, probative and substantial.” The Board’s finding

²⁷The Supreme Court recognizes that a strike is narrower in scope than concerted activities protected by Section 7 of the Act and that an employee might be engaged in concerted activities and still not be engaged in a strike (*International Union v. Wisconsin Employment Relations Board*, 336 U. S. 245, 258).

that respondents agreed to reinstate complainants fails not only because it is not supported by a *preponderance* of reliable, probative and substantial evidence. It fails because there is a complete *absence* of evidence which meets the standards prescribed by the Administrative Procedures Act that respondents agreed to reinstate complainants.

Conclusion.

Since the activities which complainants engaged in were not concerted activities protected by Section 7 of the Act, petitioner is not entitled to a judgment enforcing its order for reinstatement of complainants with back pay. Petitioner does not contend that complainants' activities were protected concerted activities, but contends that it is immaterial whether or not complainants' activities were protected by the Act. Petitioner is in error in this contention. Petitioner's power is limited to remedying violations of the Act, and if complainants' activities were not protected by the Act, then respondents did not violate the Act by refusing complainants reinstatement because of such activities.

But petitioner advances the anomalous theory that respondents agreed to reinstate complainants and that thereby respondents "waived" or "condoned" complainants' activities. Petitioner does not cite any case which *holds* that such a novel theory is tenable. Even if there were evidence to support such an anomalous theory, petitioner would not be entitled to judgment. An unprotected activity cannot, by agreement, be transformed into a protected activity.

Petitioner's anomalous theory is actually without support in the evidence. Petitioner meets two hurdles which are insuperable: (1) There is no substantial evidence of the quality required by the Administrative Procedures Act which establishes that the settlement of the *CSU strike*

resulted in an agreement to reinstate complainants whose dispute with their own union and with their employers was not settled at Cincinnati. The only testimony that could possibly be construed as evidence of any agreement by respondents with respect to the reinstatement of employees was hearsay testimony that respondents undertook to reinstate, not complainants, but the CSU strikers, and competent testimony that following the Cincinnati settlement respondents reinstated, not complainants, but the CSU strikers. (2) There is no substantial evidence of the required quality that complainants were strikers within the meaning of the Cincinnati Directive which petitioner interprets as requiring the reinstatement of all strikers who had been "on call" on March 12, 1945. The uncontradicted evidence is that sixteen of complainants were discharged and that the other seven complainants were engaged in activities which, whether of an individual or of a concerted character, were certainly not activities which constituted those complainants strikers.

The National Labor Relations Board is a statutory body of limited power. Its authority is limited to remedying violations of the National Labor Relations Act, and its orders must be based upon reliable, probative and substantial evidence. Under the law applicable to this proceeding, the Board is not entitled to enforcement of its order.

Respectfully submitted,

O'MELVENY & MYERS,

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W. B. CARMAN,

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Attorneys for Respondents.

Dated: November 14, 1950.

No. 12571

United States
Court of Appeals
for the Ninth Circuit.

DUANE MOSS, et al.,
Appellants,
vs.

HAWAIIAN DREDGING CO., et al.,
Appellees.

MARTIN H. LARSEN, et al.,
Appellants,
vs.

FLOOD BROS., a Corporation, et al.,
Appellees.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

AUG 19 1950

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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sociation of the Pacific Coast (*amici cu-
riae*).

In the United States District Court, Northern
District of California, Southern Division

No. 25299-R

DUANE MOSS, RUSSELL A. FRAGER, WILL
TAYLOR, FRANCIS P. ALVARADO, JO-
SEPH SANTOS, DAVID GONZALES, on
their own behalf and on behalf of other present
and former employees of defendants who are
similarly situated,

Plaintiffs,

vs.

CONTRACTORS P A C I F I C NAVAL AIR
BASES, a corporation; BLACK COMPANY,
a corporation; JAMES DOE and WILLIAM
ROE, doing business under the firm name and
style of WHITE COMPANY, a copartnership;
JOHN DOE; RICHARD ROE; and JAMES
DOE,

Defendants.

COMPLAINT FOR UNPAID OVERTIME
COMPENSATION UNDER THE FAIR
LABOR STANDARDS ACT

I.

Plaintiffs and each of them bring this action on
behalf of themselves and all other persons and em-
ployees similarly situated. Plaintiffs and said
other persons are hereinafter collectively and in-
dividually referred to as "plaintiffs."

II.

Plaintiffs bring this actions to recover from defendants unpaid overtime compensation and an additional equal amount of liquidated damages, pursuant to §16(b) of the Fair Labor Standards Act of 1938 (Pub. No. 718, 76th Cong.; 52 Stat. 1060), hereinafter referred to as the Act.

III.

Jurisdiction is conferred on the court by §41(8), 28 U.S.C.A. (Judicial Code) 24, giving the District Court original jurisdiction “of all suits and proceedings arising under any law regulating commerce,” and by §16(b) of the Act.

IV.

On the dates and during all of the time herein mentioned the defendant Contractors Pacific Naval Air Bases was and now is a corporation organized and doing business under the laws of a State unknown to plaintiffs and having a principal office and place of business at Oakland, Alameda County, California.

V.

Defendant Black Company now is, and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of a State unknown to plaintiffs, and duly qualified to do business, and doing business, in the State of California.

VI.

The true names of defendants Black Company, a corporation, James Doe and William Roe, doing

business under the firm name of White Company, a copartnership, and John Doe, Richard Roe and James Doe are now unknown to plaintiffs, and for that reason said defendants are sued herein by the said fictitious names; plaintiffs pray leave of this court to amend this complaint when said true names of said defendants are ascertained, and to insert said true names herein in lieu of said fictitious names in all of the papers, pleadings and records of this action, and that this action may thenceforth proceed against such defendants in their true names.

VII.

During all of the times herein mentioned defendants were engaged in interstate commerce and in marine warehouse and terminal operations at Oakland, California. Said commerce and said warehouse and terminal operations consisted and consist in the unloading of raw materials, goods and commodities arriving at said marine warehouses and terminals by truck, vessel and rail; sorting, piling and storing the same; and loading said raw materials, goods and commodities, or preparing the same for loading, into vessels, trucks and railroad cars for trans-shipment to other destinations. A substantial portion of such raw materials, goods and merchandise arrive at said warehouses and terminals direct from points outside the State of California, and is and was shipped therefrom to points outside said State. A substantial portion of defendants' said business affects or is directly connected with interstate and foreign commerce.

VIII.

In such business and during the three year period next preceding the commencement of this action, defendants employed plaintiffs as warehousemen, sweepers, Ross carrier operators, lift truck operators, truck drivers, semi-truck drivers, tractor drivers, gear men, coopers, crane men, jitney operators, and lift operators, gang bosses and foremen in connection with the operation of said warehouses and terminals. The said functions performed by plaintiffs are and were an essential part of the handling, piling, loading, unloading, sorting and storage of said raw materials, goods and merchandise and the preparation of the same for commerce, and are operations necessary thereto.

IX.

During every week of their terms of employment with defendants, plaintiffs were employed and engaged by defendants in interstate and foreign commerce and in the handling of raw materials, goods and merchandise for interstate and foreign commerce.

X.

During the three year period next preceding the commencement of this action, defendants employed plaintiffs for work weeks in excess of 40 hours without paying them, or any of them, the overtime compensation required by the Act for their employment in excess of 40 hours during such work weeks: Specifically,

(a) In determining whether or not plaintiffs

worked more than 40 hours in any work week during said three year period, for the purpose of determining whether overtime compensation under the Act was payable to plaintiffs, defendants, contrary to the provisions of the Act, excluded as hours worked all work performed by plaintiffs between the hours of 5 p.m. and 8 a.m. each week day, all hours worked between 5 p.m. Saturday and 8 a.m. Monday, all hours worked during holidays, all hours worked during the regular meal hours and all hours worked after a period of five working hours had elapsed since the last opportunity to eat.

(b) In computing the overtime rate payable after 40 hours had been worked during the work week, so-called "penalty work" such as shoveling, handling fish meal, and handling explosives, or skilled work such as the operation of fork type jitneys, or that of gang boss and foreman, which work carries premium rates of pay, defendants multiplied the base day rate of 102½¢ per hour by one and one-half and then added the penalty or skilled differential, instead of multiplying the total skilled or penalty rate, as the case might be, by one and one-half, as required by the Act.

(c) In computing the rate payable to plaintiffs for work after 40 hours in any one work week defendants computed overtime on the basis of the rate for the particular work being performed after such 40 hour period, rather than on a rate arrived at by averaging out the various rates of pay actually received and earned by plaintiffs dur-

ing the first 40 hours of such week, as required by the Act.

(d) Defendants failed and refused to pay one and one-half times the regular night, Sunday, holiday and lunch time rate, and the regular rate for handling explosives, as the case might be, for night, Sunday, holiday and lunch time work, and for handling explosives, after 40 hours of work had been completed by plaintiffs during a particular work week.

XI.

The exact number of weeks so worked by plaintiffs, the exact number of hours worked during such weeks by plaintiffs, the rates and amounts of pay received therefor, the types of work performed by plaintiffs during such period, and consequently the exact amounts by which plaintiffs were underpaid by defendants, are unknown to plaintiffs, but said exact number of weeks, hours and types of work performed and consequently the exact amounts by which plaintiffs were underpaid by defendants, are known to defendants by virtue of the fact that defendants during such period made, kept and preserved and now possess books, records and accounts of the wages and hours of plaintiffs' employment, as required by §11(c) of the Act.

Wherefore, plaintiffs pray that defendants be required to make known to plaintiffs the exact number of hours which plaintiffs are shown by defendants' records to have worked in each work week during the three year period next preceding

the commencement of this action, the type of work performed, together with the hourly wages paid for the hours worked during said period and the overtime pay, if any, paid to plaintiffs during said period.

Plaintiffs further pray that judgment be awarded each of them for unpaid overtime compensation and for an additional equal amount as liquidated damages, together with costs, and that the Court allow a reasonable attorneys' fee to be paid by the defendant.

/s/ GLADSTEIN, SAWYER &
EDISES,
Attorneys for Plaintiffs.

State of California,
City and County of San Francisco—ss.

Ewing Sibbett, being first duly sworn, deposes and says:

That he is associated with the law firm of Gladstein, Sawyer & Edises, attorneys for plaintiffs in the above entitled matter; that he makes this affidavit on behalf of plaintiffs as said plaintiffs reside outside of the City and County of San Francisco; that he has read the foregoing complaint and knows the contents thereof, and that the matters therein set forth are true of his own knowledge, except as to those matters set forth upon information and belief, and as to those matters he believes it to be true.

/s/ EWING SIBBETT.

Subscribed and sworn to before me this 13th day of November, 1945.

[Seal] /s/ DOROTHY H. McLENNAN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed November 14, 1945.

[Title of District Court and Cause.]

No. 25299-R

FIRST AMENDED COMPLAINT FOR UN-
PAID OVERTIME COMPENSATION UN-
DER THE FAIR LABOR STANDARDS
ACT

I.

Plaintiffs and each of them bring this action on behalf of themselves, on behalf of those present and former employees of defendants listed on Exhibit "A" attached hereto and made a part hereof, and on behalf of all other persons and employees similarly situated. Plaintiffs, the said employees listed on Exhibit "A," and said other persons are hereinafter collectively and individually referred to as "plaintiffs." Each and every one of the said employees listed on Exhibit "A" has authorized in writing the bringing of this action on their behalf.

II.

Plaintiffs bring this action to recover from defendants unpaid overtime compensation and an additional equal amount of liquidated damages,

pursuant to §16(b) of the Fair Labor Standards Act of 1938 (Pub. No. 718, 76th Cong.; 52 Stat. 1060), hereinafter referred to as the Act.

III.

Jurisdiction is conferred on the Court by §41(8), 28 U.S.C.A. (Judicial Code) 24, giving the District Court original jurisdiction “of all suits and proceedings arising under any law regulating commerce,” and by §16(b) of the Act.

IV.

Defendants Hawaiian Dredging Company, Limited, a corporation, Raymond Concrete Pile Company, a corporation, Turner Construction Company, a corporation, Morrison-Knudsen Company, Inc., a corporation, J. H. Pomeroy & Co., Inc., a corporation, W. A. Bechtel Co., a corporation, The Utah Construction Company, a corporation, and Black Company, a corporation, now are, and at all times herein mentioned were corporations organized and existing under and by virtue of the laws of a State or States unknown to plaintiffs, and duly qualified to do business, and doing business, in the State of California.

V.

The true names of defendants Black Company, a corporation, James Doe and William Roe, doing business under the firm name of White Company, a copartnership, and John Doe, Richard Roe and James Doe are now unknown to plaintiffs, and for that reason said defendants are sued herein by the said fictitious names; plaintiffs pray leave of this

Court to amend this complaint when said true names of said defendants are ascertained, and to insert said true names herein in lieu of said fictitious names in all of the papers, pleadings and records of this action, and that this action may thenceforth proceed against such defendants in their true names.

VI.

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VII.

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VIII.

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(c) In computing the rate payable to plaintiffs for work after 40 hours in any one work week defendants computed overtime on the basis of the rate for the particular work being performed after such 40 hour period, rather than on a rate arrived at by averaging out the various rates of pay actually received and earned by plaintiffs during the first 40 hours of such week, as required by the Act.

(d) Defendants failed and refused to pay one

and one-half times the regular night, Sunday, holiday and lunch time rate, and the regular rate for handling explosives, as the case might be, for night, Sunday, holiday and lunch time work, and for handling explosives, after 40 hours of work had been completed by plaintiffs during a particular work week.

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Wherefore, plaintiffs pray that defendants be required to make known to plaintiffs the exact number of hours which plaintiffs are shown by defendants' records to have worked in each work week during the three year period next preceding the commencement of this action, the type of work performed, together with the hourly wages paid for the hours worked during said period and the

overtime pay, if any, paid to plaintiffs during said period.

Plaintiffs further pray that judgment be awarded each of them for unpaid overtime compensation and for an additional equal amount as liquidated damages, together with costs, and that the Court allow a reasonable attorneys' fee to be paid by the defendants.

GLADSTEIN, ANDERSEN,
RESNER, SAWYER &
EDISES,

Attorneys for Plaintiffs.

State of California,

City and County of San Francisco—ss.

Ewing Sibbett, being first duly sworn, deposes and says:

That he is associated with the law firm of Gladstein, Andersen, Resner, Sawyer & Edises, attorneys for plaintiffs in the above-entitled matter; that he makes this affidavit on behalf of plaintiffs as said plaintiffs reside outside of the City and County of San Francisco; that he has read the foregoing first amended complaint and knows the contents thereof, and that the matters therein set forth are true of his own knowledge, except as to those matters set forth upon information and belief, and as to those matters he believes it to be true.

/s/ EWING SIBBETT.

Subscribed and sworn to before me this 24th day
of January, 1946.

[Seal] /s/ MARIE H. STANLEY,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires November 20, 1947.

EXHIBIT "A"

Employees of Contractors PNAB

Name	Address
John D. Belvel	6624 Outlook Avenue, Oakland
Walter Johnson	722 Brockhurst Street, Oakland
Charlie Essick	111C Singleton Avenue, Alameda
Lem I. Moore	936-33rd Street, Oakland
Elmer Smith	P.O. Box 114, Homer, Louisiana
Duffy Johnson	1121 Linden St., Oakland
Johnnie Mitchell	1722 Buena Vista Avenue, Alameda
Osborne C. Winfree	823 Washington Street, Oakland
Alcapers Singleton	1670A-34th Street, Oakland
Dan L. Hawkins	860 Willow Street, Oakland
William F. McHugh	1539 Funston Avenue, San Francisco
George W. Beers	2981 East 7th Street, Oakland
Dan Eaglin	1430-66th Street, Berkeley
William Hunter	1609-11th Street, Oakland
King F. Parker	Route 5, Box 162, El Dorado, Ark.
Celester Hawkins	589D Gibbs Street, Alameda
Thaddeus E. Tate	1712 Arbor Street, Alameda
E. G. Snowden	1123D Stalker Way, Alameda
Lee Eddie McEntire	1625 Ashby Avenue, Berkeley
Ysidro Alegria	921 Grove Street, Oakland
Juan S. Frias	1516 Woods Street, Oakland
Charles Byrne	3916 Cerrito Avenue, Oakland
Isiah Jackson	2308 Kirkham Street, Oakland
Albert Engelhardt	2130-107th Avenue, Oakland
William Jackson	511 Peralta St., Oakland
Roy Doyle	849 Poplar Court, Oakland
Frank Silva	1310-65th Street, Emeryville, Calif.
John Vierra	Box 21439 Foothill Blvd., Hayward
Murle Mehl	1240 Dwight Way, Berkeley
Evalt Riva	1339 Talbot Avenue, Berkeley
Denzil Adams	2350A Martin Street, Oakland
Manuel M. Agrela	1638-21st Avenue, Oakland
Edward Robinson	5369 Manila Avenue, Oakland

Name	Address
Manuel G. Izquierdo	261 Joaquin Avenue, San Leandro
James E. Walker	411 Hawthorne Avenue, Oakland
John Guadagna	3244 Idaho Street, Berkeley
William Seeger	2437 Grant Street, Berkeley
Joe Smoke	804 East 10th Street, Oakland
Leonard F. Petty	4782 Alvin Road, Oakland
Manuel Medeiros	2244 Este Street, Oakland
Faustino Ortiz	3228 East 12th Street, Oakland
John Tammela	730-4th Avenue, Oakland
Tony J. Moura	1615-47th Avenue, Oakland
John Paiva	1345 Clark Street, San Leandro
John Albert Nix	804 East 10th Street, Oakland
E. E. Daniels	1417 Carleton Street, Berkeley
Marco J. Pavlina	1411 First Avenue, Oakland
Albert L. Cowan	4980 Read Road, Oakland
John Hurtado	2315-9th Street, Berkeley
Henry J. Brower	16028 Via Segundo, San Lorenzo
Kenneth J. Brooks	2404 Telegraph Avenue, Oakland
Guy M. Wilson	307 Cypress Street, Alameda
Jack Rubino	1229F-65th Avenue, Oakland
Fred Otto Bueholz	1842-7th Avenue, Oakland
Fred V. Grace	3510 East 8th Street, Oakland
Willie Peterson	3039 Magnolia Street, Oakland
Ray Becerra	813 Clay Street, Oakland
Charles E. Hart	583-11th Street, Oakland
Robert H. Sherman	355 Grant Avenue, San Lorenzo
Will Taylor	933B Stalker Way, Alameda
Percy L. Dillian	25A Home Place West, Oakland
Jake Robertson	1401-9th Street, Oakland
Rafael Gonsalves	902 Castro Street, San Leandro
Joe Amate	1437-166th Avenue, San Leandro
Richard Baeza	1009 Delaware Street, Berkeley
Gino Giannini	141 Peralta Street, Hayward
John Mirizzi	873 McElroy Street, Oakland
Dick A. Rodriguez	2337 Market Street, Oakland
William H. Ford	715 Peralta Street, Apt. 310, Oakland
Samuel Ortega	1262-81st Avenue, Oakland
Joseph Mendez	969-30th Street, Oakland
John Santos, Jr.	2216 Dennison Street, Oakland
James C. Whitlock	1608-41st Avenue, Oakland
Gino Mazzanti	3153 East 27th Street, Oakland
Jess Rocha	1822-39th Avenue, Oakland
Newell C. Walker	807 Broadway, Oakland
A. Parson	1136-8th Street, Apt. 5, Oakland
Delwin I. Moss	904-36th Avenue, Oakland
D. Vukmirovich	4417 East 14th Street, Oakland
Clare A. Luckins	722B-5th Avenue, Oakland
Lauro Cortez	601 Grove Street, Oakland
Antone Rodrigues	2638 East 10th Street, Oakland

Name	Address
------	---------

Harry L. Harrison	4329 West Street, Oakland
Lawrence Aker	2432 Market Street, Oakland
Desmore Harvey	1027 Wood Street, Oakland
Joseph A. Sterling	1611 Fair View Street, Oakland
James C. Rodger	871-35th Street, Oakland
Louis Johnson	929-26th Street, Oakland
James H. Kimble	1060-37th Street, Oakland
Robert McGruder	518 Henry Street, Oakland
Jim Woodard	827A Stalker Way, Alameda
Lawrence Walker	1529 Stewart Street, Berkeley
Otis Stranahan	2745 East 17th Street, Oakland
Eddie Williams	720-5th Street, Oakland
Robert Dickerson	360 Union Street, Oakland
Albin Ventura	2733-78th Avenue, Oakland
George Valine	2150 Sonoma Way, Oakland
Ernest Berger	608-12th Street, Oakland
Albert Martinez	2127-6th Street, Berkeley
Frank Pickens	RFD #4, Box 359, Mt. Clemens, Mich.
John S. Black	518 Henry Street, Oakland
Charley Parhan	1326-12th Street, Oakland
Antone P. Perry	2802 East 9th Street, Oakland
Matron Martin	3428 Haven Street, Oakland
Willie Fountain	1683-14th Street, Oakland
Isaiah Brooks	926-33rd Street, Oakland
William C. Cameron	1032-7th Street, Oakland
David Minor	1727 Grove Street, Oakland
Robert Alex	320B Mosley Street, Alameda
Larnel Gibson	927 Cypress Street, Oakland
Joe C. Bennett	1628 Kirkham Street, Oakland
Cecil E. Shigg	873 Apgar Street, Oakland
Fred R. Cuccia	1093 Peralta Avenue, Albany
John H. Davis	1234-10th Street, Oakland
David A. Wilson	2923 Harper Street, Berkeley
Gilbert Johnson	1280-8th Street, Oakland
Willis R. Bower	3233 Helen Street, Oakland
Ralph Ingwersen	1081 Annseley Road, Piedmont
David S. Contreros	342 Henry Street, Oakland
Emil Johnson	2578 California Street, San Francisco
Max G. Terrazas	1534-15th Street, Oakland
W. M. Johnson	1728-10th Street, Oakland
Henry Clayton	1634 Telegraph Avenue, Oakland
Val Mourer	2036 Encinal Avenue, Alameda
John L. Pryor	902 Linden Street, Oakland
William Jefferson	985-8th Street, Oakland
Frank Lorence	1733-16th Avenue, Oakland
Joseph I. Valdez	976-14th Street, Oakland
Rado Abradovich	1319-94th Avenue, Oakland
Manuel M. Rezendes	1729-23rd Avenue, Oakland
Clide H. Marshall	1726-10th Street, Oakland

Name	Address
John R. Murrish	2206 Havenseourt Blvd., Oakland
Roosevelt Thomas	1532-9th Street, Oakland
Morton R. Hodges	9841 Empire Road, Oakland
Watson Alston	855C Stalker Way, Alameda
Donald E. Dedman	3023 Center Street, Richmond
Edward Logan	2432 Laredo Street, Richmond
Joseph A. Kelly	1344 Parker Street, Berkeley
Monroe Applewhite	1632 Oregon Street, Berkeley
Tom Deloney	1014 Linden Street, Oakland
Junius P. Withers	1627-51st Avenue, Oakland
Jesse Stephens	1073-24th Street, Oakland
Willie W. Brinston	431A Mosley Avenue, Alameda
Thomas W. Smith	2412C Martin Street, Alameda
James Parker	1084-3rd Street, Oakland
Willie B. Scott	1656-7th Street, Oakland
Jesse Niehoff	582-5th Street, Oakland
Howard Oaks	2610 San Pablo Avenue, Oakland
Billy Erath	1309 Magnolia Street, Oakland
Sanford McPierson	2443 Poplar Street, Oakland
Earvin G. Catherine	3520 West Street, Oakland
James Porter	818 Gilman Street, Berkeley
Kay Porter	813-42nd Street Oakland
Sylvester Daniels	1032-63rd Street, Oakland
Anthony Carlee	936-33rd Street, Oakland
Charley Williams	1032-63rd Street, Oakland
A. A. Whitaker	999-60th Street, Oakland
George Kachuck	101-2F S. 11th Street, Richmond
Orell Andrews	533 Magnolia Street, Oakland
John Wills	1111 Willow Street, Oakland
Juan Alvares	636 Jefferson Street, Alameda
Dan Ross	1240 Union Street, Oakland
Lark Sloan	1683 Atlantic Street, Oakland
Charlie Sanders	1635-15th Street, Oakland
Lathers Smith	4920 Seaport Street, Richmond
Mike Ruiz	65 Defense Ct., Auditorium Vil., Oakland
Kenneth Curry	698 A Street, Hayward
Frank Lafiton	1233 Chestnut Street, Oakland
Willis E. Andrews	533 Magnolia Street, Oakland
Henry Wright	1317 Alcatraz Avenue, Berkeley
Edward Anderson	2709 Linden Street, Oakland
W. L. Lewis	4321 Stockton Street, Richmond
James Rivers	1717 Chase Street, Oakland
Joe Arcenauet	715 Peralta Street, Oakland
Robert MeJoy	517C Gibbs Avenue, Alameda
Harrison Conner	2703 Linden Street, Oakland
Manuel Abren	5412 Wentworth Avenue, Oakland
Joe Montemayor	692-4th Street, Oakland
Ernest Posey	717 Franklin Street, Oakland
Arthur Starghill	504 Center Street, Oakland

Name	Address
Dan Thornton	529-8th Street, Oakland
Willie N. Raulston	Singleton Street, Alameda
Frank Sacconago	466 Pacific Avenue, Alameda
William Allen	1108-10th Street, Oakland
John Valin	California Hotel, Alameda
Albert Jackson	524 Adeline Street, Oakland
L. Onate	173-3rd Street, Oakland
Van W. Davis	705 Brush Street, Oakland
Tony G. Hidalgo	RFD Box 926, San Lorenzo
John Leslie Billett	6114 East 17th Street, Oakland
Angelo L. Chiappari	794 Jackson Street, Hayward
Harry Thomas	3437 Harlem Street, Oakland
Milton E. Nelson	1035 Taylor Avenue, Alameda
James Rogers	871-35th Street, Oakland
Ernest Bush	3rd Street, Oakland
Emile Lauricella	316 Myrtle Street, Oakland

[Endorsed]: Filed January 28, 1946.

In the United States District Court for the Northern District of California, Southern Division

No. 26060-S

MARTIN H. LARSEN, on his own behalf and on behalf of all other persons and employees of defendants who are similarly situated,

Plaintiffs,

vs.

FLOOD BROS., a corporation; BLACK COMPANY, a corporation; JAMES DOE and WILLIAM ROE, doing business under the firm name and style of WHITE COMPANY, a co-partnership; JOHN DOE, RICHARD ROE and JAMES DOE,

Defendants.

FIRST AMENDED COMPLAINT FOR UNPAID OVERTIME COMPENSATION UNDER THE FAIR LABOR STANDARDS ACT

I.

Plaintiff named above brings this action on behalf of himself and on behalf of all other persons and employees of the defendants similarly situated. Plaintiff and said other persons and employees are hereinafter collectively and individually referred to as plaintiffs, including but not limited to the plaintiffs named on Exhibit "A," attached hereto and made a part hereof.

II.

Plaintiffs bring this action to recover from de-

defendants unpaid overtime compensation and an additional equal amount of liquidated damages, pursuant to section 16(b) of the Fair Labor Standards Act of 1938 (Pub. No. 718, 76th Cong.; 52 Stat. 1060), hereinafter referred to as the Act.

III.

Jurisdiction is conferred on the court by section 41 (8), 28 U.S.C.A. (Judicial Code) 24, giving the District Court original jurisdiction "of all suits and proceedings arising under any law regulating commerce," and by section 16(b) of the Act.

IV.

On the dates and during all of the times herein mentioned the defendant Flood Bros. was and now is a corporation organized and doing business under the laws of a State unknown to plaintiffs, having its principal office and place of business at San Francisco, California.

V.

Defendant Black Company now is, and at all times herein mentioned, was a corporation organized and existing under and by virtue of the laws of a State or Territory unknown to plaintiffs, and duly qualified to do business, and doing business, in the City and County of San Francisco, State of California.

VI.

The true names of defendants James Doe and William Roe, doing business under the firm name and style of White Company, a co-partnership, and

John Doe, Richard Roe and James Doe, are now unknown to plaintiffs and for that reason said defendants are sued herein by the said fictitious names; plaintiffs pray leave of this Court to amend this complaint when said true names of said defendants are ascertained, and to insert said true names herein in lieu of said fictitious names in all of the papers, pleadings and records of this action, and that this action may thenceforth proceed against such defendants in their true names.

VII.

During all of the times herein mentioned defendants herein engaged in the loading and discharging of vessels, transportation of commodities originating outside the State of California, handling, storage and wholesaling of commodities originating from points outside the State of California, maintenance and repair of facilities for persons engaged in interstate and foreign commerce and for firms engaged in the manufacture of commodities for interstate and foreign commerce, or employed and engaged by defendants in occupations related thereto.

VIII.

During the three year period next preceding the filing of this action plaintiffs were employed by defendants, and during every week of such employment with defendants, plaintiffs were employed and engaged by defendants in interstate and foreign commerce, or employed and engaged by defendants in occupations related thereto.

IX.

In such business and during the three year period next preceding the commencement of this action defendants employed plaintiffs in the capacities of walking bosses, ship bosses, and dock bosses.

X.

During the three year period next preceding the commencement of this action defendants employed plaintiffs for work weeks in excess of forty hours without paying plaintiffs, or any of them, the overtime compensation required by the Act for such employment during such work weeks, in that:

(a) In determining whether or not plaintiffs or any of them worked more than 40 hours in any work week during said three year period, for the purpose of determining whether overtime compensation under the Act was payable to plaintiffs, defendants, contrary to the provisions of the Act, excluded as hours worked all work performed by each of the plaintiffs in excess of 6 hours between the hours of 8 a.m. and 5 p.m. each week day, all work performed by each plaintiff between the hours of 5 p.m. and 8 a.m. each week day, all hours worked between 5 p.m. Saturday and 8 a.m. Monday, all hours worked during legal holidays, all hours worked during the regular meal hours and all hours worked after a period of five working hours had elapsed since the last opportunity to eat.

(b) Defendants failed and refused to pay

[Title of District Court and Cause.]

No. 25299-R

AMENDMENT TO FIRST AMENDED COMPLAINT FOR UNPAID OVERTIME COMPENSATION UNDER THE FAIR LABOR STANDARDS ACT

The First Amended Complaint on file in the above-entitled action is hereby amended as follows:

I.

Paragraph I thereof is hereby amended by striking out on lines 7 and 8 of page 2 thereof the words "and on behalf of all other persons and employees similiarly situated," and on line 9 thereof the words "and said other persons."

II.

Exhibit "A" attached to said First Amended Complaint is hereby amended by adding thereto the following names:

Edward A. Carmo, Earle E. Daniels, Oscar Gray, Sylvester Houston, Everett Pahkala, Leo Palmer, William J. Perez, James Rivers, Lark Sloan, and Monroe Thomas.

Dated: October 5, 1946.

GLADSTEIN, ANDERSEN,
RESNER, SAWYER &
EDISES,

/s/ EWING SIBBETT,
Attorneys for Plaintiffs.

[Endorsed]: Filed October 8, 1946.

[Title of District Court and Cause.]

No. 26060-S

AMENDMENT TO FIRST AMENDED COMPLAINT FOR UNPAID OVERTIME COMPENSATION UNDER THE FAIR LABOR STANDARDS ACT

The First Amended Complaint on file in the above-entitled action is hereby amended as follows:

I.

Paragraph I thereof is hereby amended by deleting said paragraph and substituting therefor the following paragraph:

“Plaintiff named above brings this action on behalf of himself and on behalf of those persons listed on Exhibit ‘A’ attached hereto and made a part hereof. Plaintiff and said other persons are hereinafter collectively and individually referred to as ‘plaintiffs’.”

Dated: December 17, 1946.

GLADSTEIN, ANDERSEN,
RESNER, SAWYER &
EDISES,

/s/ RICHARD GLADSTEIN,
Attorneys for Plaintiffs.

[Endorsed]: Filed December 23, 1946.

BYRNE ORGANIZATION, A COPARTNERSHIP, SAID CORPORATIONS AND THE LAST NAMED COPARTNERSHIP DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF CONTRACTORS PACIFIC NAVAL AIR BASES, A JOINT VENTURE.

Now come the defendants above named and make this their answer to plaintiffs' first amended complaint on file herein, and admit, deny and aver as follows:

First Defense

The first amended complaint does not state a claim against the defendants upon which relief can be granted.

Second Defense

Each of the plaintiffs who was employed by defendants received compensation in full compliance with all of the terms and provisions of said Fair Labor Standards Act of 1938, and each of said plaintiffs was compensated by defendants for all hours worked by him for said defendants in excess of forty hours in any one work week at a rate of not less than one and a half times the regular rate of pay at which each such plaintiff was employed by defendants.

Third Defense

I.

These defendants aver that they are without knowledge or information sufficient to form a be-

lief as to the truth of the allegations contained in paragraphs I and V of said first amended complaint.

II.

These defendants admit the allegations contained in paragraphs II, III, and IV of said first amended complaint.

III.

Answering the allegations contained in paragraph VI of said first amended complaint, the defendants Hawaiian Dredging Company, Limited, J. H. Pomeroy & Co., Inc., W. A. Bechtel Co., The Utah Construction Company, and the Byrne Organization admit that in the period from November 14, 1942, through December 31, 1943, and the defendants Raymond Concrete Pile Company, Turner Construction Company, and Morrison-Knudsen Company, Inc., admit that during all of the times mentioned in said first amended complaint, they were engaged in marine warehouse and terminal operations in Oakland, California, consisting of the unloading of raw materials, goods and commodities arriving at said marine warehouse and terminal by truck, vessel and rail; sorting, piling and storing the same; and loading said raw materials, goods and commodities, or preparing the same for loading into vessels, trucks and railroad cars for transshipment to other destinations; and admit, for the purposes of this case only, that to the extent of the operations in which the plaintiffs were employed, they were engaged in interstate commerce. The defendants aver that they are without knowledge or

information sufficient to form a belief as to the truth of the allegations contained in said paragraph VI concerning the activities or operations of the other defendants, or in so far as they refer to the other defendants; and deny each and every other allegation contained in said paragraph VI of said first amended complaint.

IV.

Answering the allegations of paragraph VII of said first amended complaint, defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph VII concerning the activities or operations of the other defendants, or in so far as they refer to the other defendants. These defendants admit that they employed the plaintiffs in some of the classifications mentioned in said paragraph VII during some of the three-year period mentioned therein, but deny that they employed all the plaintiffs during all of said three-year period; and deny each and every other allegation contained in said paragraph VII of said first amended complaint.

V.

These defendants, for the purposes of this case only, admit the allegations of paragraph VIII of the first amended complaint except that they deny that all plaintiffs were employed during every week covered by the action, and further aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegations

of said paragraph concerning the activities or operations of the other defendants or in so far as they refer to the other defendants; and deny each and every other allegation contained in said paragraph VIII of said first amended complaint.

VI.

Answering the allegations of paragraph IX of the first amended complaint, defendants aver that the plaintiffs were employed under the terms of a collective bargaining agreement which established a normal working day, with a straight time rate of pay applicable to work done during the hours of said normal working day, and designated all hours outside said normal working day as overtime and fixed the rate of pay for work in said overtime hours at one and a half times the straight time rate of pay. The collective bargaining agreements in effect at one time or another during the period covered by this action established certain so-called "differentials" for the performance of certain kinds of work (called skill differentials) and for the handling of particular kinds of cargo (called cargo or penalty differentials). Defendants say that until August 1, 1944, they paid the plaintiffs straight time pay for work in the normal working hours, plus any applicable differentials, and overtime pay for work in overtime hours, plus any applicable differentials; but that on and after August 1, 1944, the defendants paid the plaintiffs straight time pay for work in the normal working hours, plus applicable differentials, and overtime pay, plus

time and a half applicable differentials for work in overtime hours. In any week in which a plaintiff worked more than 40 hours during the straight time hours, the defendants, prior to August 1, 1944, paid him for each such hour in excess of 40, one and a half times the straight time rate plus any applicable differential; and after August 1, 1944, the defendants paid him one and a half times the straight time rate, and one and a half times any differentials which were applicable. The defendants aver that payments made in this manner were in full compliance with all the requirements of the Fair Labor Standards Act. The defendants deny each and every allegation contained in paragraph IX of the first amended complaint except to the extent that they are admitted in the foregoing averments.

VII.

Answering the allegations contained in paragraph X of the said first amended complaint, defendants admit that during the period mentioned in said first amended complaint, defendants made, kept and preserved and now possess records and accounts of the wages and hours of employment of their employees, including the plaintiffs, who were employed by defendants, as required by section 11 (c) of the Fair Labor Standards Act of 1938 (Public Law No. 718, 75th Congress, 52 Stat. 1060), showing the number of weeks worked, the number of hours worked during each week, the types of work performed and the rates and amounts of pay received therefor; aver that they are with-

out knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph X concerning the knowledge of plaintiffs, or any of them, or the activities or operations of the other defendants or in so far as they refer to the other defendants; and deny each and every other allegation contained in said paragraph X of said first amended complaint.

Fourth Defense

Defendants aver that the plaintiffs whose names appear in Appendix A of this answer did not work for defendants, or either of them, during the period covered by this action, and the defendants therefore deny liability to any of them. In the other portions of this answer the words "the plaintiffs" are to be taken as applicable to all named plaintiffs other than those listed in Appendix A, except that if it should appear at the trial that any plaintiff listed in Appendix A did in fact work for the defendants, they are also to be included in the said words.

Fifth Defense

That the alleged rights of action set forth in said first amended complaint did not accrue within one year next before the commencement of said actions, and are barred by subdivision 1 of section 340 of the Code of Civil Procedure of the State of California.

Sixth Defense

That the alleged rights of action set forth in said

first amended complaint did not accrue within two years next before the commencement of said actions, and are barred by subdivision 1 of section 339 of the Code of Civil Procedure of the State of California.

Wherefore, defendants pray that plaintiffs take nothing by their said action, and that defendants be hence dismissed and have judgment for their costs and such other and further relief as may be meet and proper in the premises.

Dated: November 25, 1946.

FRANK J. HENNESSY, ESQ.,
United States Attorney for the Northern District
of California.

By /s/ FRANK J. HENNESSY.

JOHN F. SONNETT, ESQ.,
Assistant Attorney General
of the United States.

By /s/ FRANK J. HENNESSY.

J. FRANCIS HAYDEN, ESQ.,
Special Assistant to the Attorney General of the
United States.

By /s/ FRANK J. HENNESSY.

MARVIN C. TAYLOR, ESQ.,
Special Attorney, Department of Justice of the
United States.

By /s/ FRANK J. HENNESSY,
Attorneys for Defendants.

Appendix A

Watson Alston	Edward Logan
Orell Andrews	Lee Eddie McEntire
Willis E. Andrews	Robert McJoy
Monroe Applewhite	Howard Oaks
John Leslie Billett	L. Ovate
Willie B. Brinston	James Parker
Earvin G. Catherine	James Porter
Angelo L. Chiappari	Kay Porter
Kenneth Curry	Willie N. Raulston
Van W. Davis	James Rivers
Donald E. Dedman	Willie B. Scott
Tom Deloney	Lathers Smith
Billy Erath	Thomas W. Smith
Gino Giannini	E. J. Snowden
Celester Hawkins	Jesse Stephen
Dan Hawkins	Thaddeus S. Tate
Albert Jackson	Harry Thomas
George Kachuck	Dan Thornton
Joseph A. Kelly	John Valin
Frank Labiton	Junius P. Withers
W. L. Lewis	

[Endorsed]: Filed November 25, 1946.

Amended Complaint it was engaged in the loading and discharging of vessels and handling of commodities, some of which originated from points outside of the State of California and some of which did not originate outside the State of California. This defendant denies generally and specifically, each and all of the allegations of paragraph VII of the First Amended Complaint which are not specifically alleged in this paragraph.

V.

Answering the allegations of paragraphs VIII and IX of the first Amended Complaint, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraphs VIII and IX concerning the activities or operations of other defendants or in so far as they refer to other defendants; denies that defendant employed plaintiffs listed in Appendix A attached hereto, or any of them, at any time during the three-year period mentioned in paragraphs VIII and IX; admits that defendant employed the remaining named plaintiffs as walking bosses during some of the three-year period mentioned in paragraphs VIII and IX; but denies that it employed all of the remaining plaintiffs during all of said three-year period; alleges, for the purposes of this action only, that during the time that any of the plaintiffs were engaged in producing or handling goods moving in interstate commerce they were employed and engaged in interstate commerce as alleged, but denies that any of

the plaintiffs produced or handled any goods at all, within the meaning of the act; and denies generally and specifically, each and all of the allegations contained in paragraphs VIII and IX of the First Amended Complaint which are not specifically alleged in this paragraph.

VI.

Answering the allegations of paragraph X of the First Amended Complaint, defendant alleges that plaintiffs were employed under the terms of oral agreement which established a normal working day, with a straight time rate of pay applicable to the work done during the hours of said normal working day, and which designated all hours outside said normal working day as overtime hours and fixed the rate of pay for work in said overtime hours at the rate of one and one half times the straight time rate of pay. The oral agreements in effect at one time or another during the period covered by this action established certain so-called "differentials" for the supervision of the handling of particular kinds of cargo (called cargo or penalty differentials). Defendant alleges that until October 1, 1944, it paid plaintiffs straight time pay for work in the normal working hour, plus any applicable differentials, and overtime pay for work in overtime hours, plus any applicable differentials; but that on and after October 1, 1944, defendant paid plaintiffs straight time pay for work in the normal working hours, plus applicable differentials and overtime pay, plus time and a

half applicable differentials for work in overtime hours. In any week in which a plaintiff worked more than 40 hours, defendant prior to October 1, 1944, paid him for each hour in excess of forty, one and a half times the straight time rate plus any applicable differential; and after October 1, 1944, the defendant paid such plaintiff one and a half times the straight time rate, and one and a half times any differentials which were applicable. Defendant alleges that payments in this manner were in full compliance with all the requirements of the Fair Labor Standards Act. Defendant denies each and every allegation contained in paragraph X of the First Amended Complaint which is not specifically alleged in this paragraph.

VII.

Answering paragraph XI of First Amended Complaint, defendant alleges that during the period mentioned therein, defendant made, kept and preserved and now possesses records and accounts of wages and hours of employment of its employees, including plaintiffs who were employed by defendant, showing the number of weeks worked, the number of hours worked during each week, the types of work performed, and the rates and amounts of pay received therefor; and complied with all the requirements of Section 11 (c) of the Fair Labor Standards Act. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph XI concerning the

knowledge of plaintiffs, or any of them, or the activities or operations of other defendants or in so far as they refer to other defendants; and denies each and every other allegation contained in said paragraph XI of said First Amended Complaint.

Fifth Defense

The alleged rights of action set forth in said First Amended Complaint did not accrue within one year next before the commencement of said actions, and are barred by subdivision 1 of section 340 of the Code of Civil Procedure of the State of California.

Sixth Defense

The alleged rights of action set forth in said First Amended Complaint did not accrue within two years next before the commencement of said actions, and are barred by subdivision 1 of section 339 of the Code of Civil Procedure of the State of California.

Wherefore, defendant prays that plaintiffs take nothing by their said action, and that defendant be hence dismissed and have judgment for its costs and such other and further relief as may be meet and proper in the premises.

Dated: January 2, 1947.

/s/ GREGORY A. HARRISON,
BROBECK, PHLEGER &
HARRISON,

Attorneys for Defendant
Designated Above.

[Endorsed]: Filed January 3, 1947.

[Title of District Court and Cause.]

No. 25301-G, No. 25300-S, No. 25302-R, and No. 25299-R.

STIPULATION AND ORDER FOR
CONSOLIDATION

It Is Hereby Stipulated by and between respective counsel for the parties to the above entitled actions that said actions may be consolidated for trial on May 20, 1947, before the Hon. Louis E. Goodman, Judge of the Federal District Court, with the following numbered cases now set for consolidated trial before the said Judge Louis E. Goodman, on May 20, 1947:

26061 G	26243 R	26077 S
26074 G	26071 R	26073 S
26064 G	26075 S	26247 S
26067 G	26060 S	27001 H
26068 G	26245 H	
26072 G	26242 S	26535 R
26076 R	26063 S	26536 G
26078 R	26069 S	26919 G
26066 R	26065 S	26070 G
26062 R	26537 S	

Dated: April 30, 1947.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

/s/ RICHARD GLADSTEIN,
Attorneys for Plaintiffs.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Defendants.

/s/ C. ELMER COLLETT,
Asst. U. S. Attorney. '

It Is So Ordered April 30, 1947.

/s/ LOUIS GOODMAN,
Judge of the United States
District Court.

Dated: April 30, 1947.

[Endorsed]: Filed April 30, 1947.

In the United States District Court for the North-
ern District of California, Southern Division
No. 25299-G

DUANE MOSS, et al.,

Plaintiffs,

vs.

HAWAIIAN DREDGING CO., et al.,

Defendants.

MOTION OF DEFENDANT
TO AMEND ANSWER

Defendant moves the court to amend its answer
on file herein by adding thereto the following addi-
tional defenses:

Tenth Defense

The defendant says that Section 9 of the Portal-to-Portal Act of 1947 provides that, "no employer shall be subject to any liability . . . for or on account of the failure of the employer to pay . . . overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged . . ."

The defendant says that in paying the plaintiffs as it did (the act or omission of not paying them otherwise being the basis of the present actions) the defendant was acting in good faith in conformity with and in reliance upon acts of the United States Maritime Commission, the Army, the Navy, United States Department of Labor, the Wage and Hour Division, the War Labor Board, the Wage Stabilization agencies, the United States Department of Justice, of such character as to be properly classifiable as an administrative regulation, order, ruling, approval, or interpretation of an agency of the United States, or as an administrative practice or enforcement policy of an agency of the United States with respect to the class of em-

ployers to which the defendant belongs within the meaning of these words as used in said section 9; and therefore the plaintiffs are barred from recovery by the provisions of said section.

Eleventh Defense

As a supplemental and additional defense the defendant pleads the applicability and effect of Public Law 177 of the 81st Congress, First Session, which became effective as of July 20, 1949, reading as follows:

“An Act

“To clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended.

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 7 of the Fair Labor Standards Act of 1938, as amended, is amended by adding at the end thereof a new subsection (e), to read as follows:

““(e) For the purpose of computing overtime compensation payable under this section to an employee—

(1) who is paid for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the workweek, at a premium rate not less than one and one-half times the rate established in good faith for like work per-

formed in non-overtime hours on other days,
or

(2) who, in pursuance of an applicable employment contract or collective bargaining agreement, is paid for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), at a premium rate not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

the extra compensation provided by such premium rate shall not be deemed part of the regular rate at which the employee is employed and may be credited toward any premium compensation due him under this section for overtime work.'

"Sec. 2. No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to the date of enactment of this Act, if the compensation paid prior to such date for such work was at least equal to the compensation which would have been payable for such work had the amendment made by section 1 of this Act been in effect at the time of such payment.

"Approved July 20, 1949."

The defendant says that during all periods when the plaintiffs worked for the defendant, the defendant paid them, prior to July 20, 1949, compensation for their work which was at least equal to the compensation which would have been payable for such work had subsection (e) of Section 7 of the Fair Labor Standards Act of 1938, as so amended, been in effect during such periods.

/s/ FRANK J. HENNESSY,
United States Attorney, Northern District of California.

/s/ H. G. MORISON,
Assistant Attorney General
of the United States.

/s/ EDWARD H. HICKEY,
Special Assistant to the Attorney General.

/s/ MARVIN C. TAYLOR,
Special Attorney, Department
of Justice.

Attorneys for this Defendant.

[Endorsed]: Filed September 12, 1949.

In the United States District Court for the Northern District of California, Southern Division

No. 25299-G

DAUNE MOSS, et al.,

Plaintiffs,

vs.

HAWAIIAN DREDGING CO., et al.,

Defendants.

No. 26060-G

MARTIN H. LARSEN, et al.,

Plaintiffs,

vs.

FLOOD BROS., a corporation, et al.,

Defendants.

CONSOLIDATED CASES, hereby referred to and made a part hereof by number:

Nos. 25300, 25301, 25302, 26061, 26062, 26063, 26064, 26065, 26066, 26067, 26068, 26069, 26070, 26071, 26072, 26073, 26074, 26075, 26076, 26077, 26078, 26242, 26243, 26245, 26247, 26535, 26536, 26537, 27001, 26919.

SUPPLEMENTAL OPINION AND FINDINGS

Under date of March 31, 1949, the Court filed an opinion herein holding that the special defenses asserted by defendants under Sections 9 and 11 of the Portal-to-Portal Act of 1947 (29 USC 251

et seq.) were sustained by the evidence and that defendants were therefore entitled to judgment. Subsequently additional motions were filed by both sides and hearings were had by the Court with respect to the motions and with respect to the findings. Briefs have been filed and arguments had upon all of these matters.

The Court now makes the following disposition of the motions presented:

1. Plaintiffs' motions for leave to file supplemental complaints are severally denied.
2. Defendants' motions, filed on September 12, 1949, to amend the answers herein are severally granted.
3. The Court having reserved ruling upon the admission in evidence of the deposition of David A. McCabe offered at the time of the trial of this case, now admits the same in evidence.

Findings

1. The Court finds that the defendants, who were members of the Waterfront Employers Association, relied in good faith upon the administrative rulings of the Administrator of the Fair Labor Standards Act and in good faith followed the pay practices approved by such rulings.
2. The Court finds that the defendants "Contractors Pacific Naval Air Bases" who were non-members of the Waterfront Employers Association in good faith relied upon the administrative rulings

which approved the pay practices followed by them.

3. The Court finds that the obtaining of indemnity agreements by the employers from certain governmental agencies in no way militated against good faith reliance upon the part of the employers upon the administrative rulings referred to in findings 1 and 2.

4. The Court makes no finding upon the issue raised by the defendants as to the alleged "executive" status of the "walking bosses," in view of findings 1, 2 and 3.

5. The findings hereinbefore made are intended to and are hereby made applicable to cover so-called "penalty cargo" and "skill differentials."

6. Since the filing of the Court's opinion of March 31, 1949, Public Law 177 was enacted by the Congress on July 20, 1949, and approved by the President. By Section 2 thereof, liability of employers, under the Fair Labor Standards Act of 1938, upon the claims asserted by the plaintiffs in this consolidated action, is retroactively terminated. Defendants, having by amendment to their answers, pleaded Public Law 177 as a special defense, the Court sustains the said defense and finds the same to be a valid bar to the causes of action asserted by the plaintiffs.¹

¹At the final hearing upon the settlement of findings and the various motions, counsel for plaintiffs urged that the Court fix a time for further oral argument upon the question raised as to the Constitutionality of Public Law 177. Both sides have

Conclusions of Law

Defendants are entitled to judgment, in their favor, for the reasons stated in the Court's opinion of March 31, 1949, and judgment will be entered accordingly in favor of defendants for their costs of suit.

Dated: November 25, 1949.

/s/ LEWIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed November 28, 1949.

thoroughly briefed this question. After a careful study of the briefs and of the issue involved, I am satisfied that the issue of unconstitutionality as raised is not substantial. Public Law 177, particularly as to its retroactive provisions, is identical to Section 2 of the Portal-to-Portal Act of 1947 (29 USC 252). In many Circuits, the Constitutionality of the Portal-to-Portal Act has been sustained and the Supreme Court has denied certiorari in nine cases. Inasmuch as the overwhelming weight of authority and reason, in my opinion, makes the issue of the Constitutionality of Public Law 177 no longer a substantial question, I see no reason for additional oral argument and further delay in the final disposition of this cause.

[Title of District Court and Causes.]

MOTION FOR NEW TRIAL

Comes now the plaintiffs herein, by their counsel, Messrs. Gladstein, Andersen, Resner & Sawyer, and move the Court to set aside that certain Opinion of March 30, 1949, and those certain Findings of Fact and Conclusions of Law and Judgment of November 25, 1949, and to grant to plaintiffs a new trial on the following grounds:

I.

The Court erred in ruling that Public Law 177 (81st Congress, First Session) was constitutional, it being the contention of the plaintiffs that said statute, and particularly its retroactive feature, is unconstitutional and violative of various provisions of the United States Constitution and the Amendments thereto.

II.

The Court erred as a matter of law in finding a judgment for defendants and against plaintiffs. The judgment in favor of defendants herein was contrary to law and in conflict with the Supreme Court decision in *Bay Ridge Operating Co., Inc., v. Aaron*, 334 U. S. 446.

III.

The Court erred as a matter of law in sustaining defendants' defenses under the Portal Act of 1947 (29 USC 252), said statute and the various provisions thereof insofar as they are applicable in the instant case being unconstitutional and con-

trary to the provisions of the United States Constitution and Amendments thereto.

IV.

The Court erred as a matter of law in sustaining defendants' so-called "good faith defenses" under the Portal Act of 1947, and particularly the Court erred in sustaining the so-called "Dorothy Williams letter" as constituting an administrative ruling on which the defendants in good faith relied. Said Dorothy Williams' letter was not an administrative ruling, and the defendants did not in good faith rely on same.

V.

The Court erred as a matter of law in finding for the defendants and in failing to find that the defendants were not in good faith reliance on any so-called administrative ruling, by virtue of the fact that the defendants had obtained indemnity agreements from the United States on account of any liability which might be imposed against them in the instant case; that the defendants could not be in good faith in that the United States is the real party in interest in this proceeding, and that independently of anything that defendants may have done, the United States was not in good faith reliance on any administrative rulings or otherwise.

VI.

The Court erred as a matter of law in failing to rule that plaintiffs were entitled to penalty cargo and skill differential wage payments in the

instant case and that defendants violated the Fair Labor Standards Act in said respects.

VII.

The Court erred as a matter of law in failing to permit plaintiffs to file supplemental complaints for the periods of time intervening between the filing of the instant action and the decision herein.

VIII.

The Court erred as a matter of law in failing to find that the defendants were not in good faith reliance on any so-called administrative rulings after the decision by the Court of Appeals for the Second Circuit in *Bay Ridge Operating Co., Inc., v. Aaron*, *supra*.

IX.

The Court erred as a matter of law in rendering the opinion and making findings of fact and conclusions of law herein, and in failing to adopt the findings of fact and conclusions of law proposed by plaintiffs.

X.

The Court erred as a matter of law in permitting defendants to amend their answers herein, and particularly the Court erred in granting defendants' motions to amend answers filed on September 12, 1949.

XI.

The Court committed various legal errors in receiving evidence offered by defendants and in rejecting evidence offered by plaintiffs.

XII.

The judgment herein is contrary to the evidence and is not supported by the evidence.

XIII.

The evidence herein requires a judgment in favor of plaintiffs and against defendants.

XIV.

The Court erred as a matter of evidence in receiving testimony concerning so-called good faith defenses and erred as a matter of evidence in finding that the so-called Dorothy Williams letter constituted a ruling, and erred further in finding that defendants in good faith relied thereupon.

XV.

The Court erred as a matter of evidence in finding that there were other administrative rulings which defendants in good faith relied upon.

XVI.

The Court erred as a matter of evidence in receiving evidence allowing defenses under the Portal Act of 1947, and said evidence should have been excluded and rejected.

XVII.

The Court erred in receiving into evidence the position of David A. McCabe.

XVIII.

The Court made various errors with respect to the admission of evidence which was received at

the request of defendants, and erred in rejecting and refusing to receive various evidence offered by the plaintiffs.

XIX.

Plaintiffs have obtained and come into possession of newly discovered evidence since the trial herein, which they could not with due diligence have discovered prior to the trial herein, and in connection with this newly discovered evidence, plaintiffs will file affidavits hereinafter.

This motion is based upon the grounds above specified, upon all of the files, records, papers and proceedings herein, upon affidavits to be filed hereafter, and upon argument of counsel.

Dated: December 5, 1949.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

By /s/ RICHARD GLADSTEIN,
/s/ HERBERT RESNER,
/s/ EWING SIBBETT,
Attorneys for Plaintiffs.

Order Extending Time to File Affidavits

Good cause appearing to the Court therefor,

Plaintiffs are allowed until and including December 25, 1949, within which to file affidavits in support of their motion for new trial herein.

Dated: December 5, 1949.

/s/ LEWIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed December 5, 1949.

In the United States District Court for the Northern District of California, Southern Division

No. 25299-G

DUANE MOSS, et al.,

Plaintiffs,

vs.

HAWAIIAN DREDGING CO., et al.,

Defendants.

Consolidated cases, hereby referred to and made a part hereof by number:

Nos. 25300, 25301, 25302, 26060, 26061, 26062, 26063, 26064, 26065, 26066, 26067, 26068, 26069, 26070, 26071, 26072, 26073, 26074, 26075, 26076, 26077, 26078, 26242, 26243, 26245, 26247, 26535, 26536, 26537, 26919, 27001.

JUDGMENT

The above-entitled cause and cases consolidated therewith came on regularly for trial on the 27th day of March, 1947, and were continued thereafter from day to day and time to time until final submission on November 21, 1949, before the Court sitting without a jury, Messrs. Gladstein, Andersen, Resner & Sawyer appearing for the plaintiffs, and H. G. Morison, Assistant Attorney General of the United States; Edward H. Hickey, Special Assistant to the Attorney General; Marvin C. Taylor, Special Attorney of the Department of Justice; Frank J. Hennessy, United States Attorney for the Northern District of California, and C. Elmer Col-

lett, Assistant United States Attorney for said District, appearing for the defendants, and evidence both oral and documentary having been introduced and the causes submitted for decision, and the Court having rendered its decision and filed its Findings of Fact and Conclusions of Law, and having ordered that judgment be entered in favor of the defendants in accordance therewith,

Wherefore, by reason of the law and the facts herein, It Is Ordered, Adjudged and Decreed by the Court that the plaintiffs take nothing by their complaints herein.

It Is Further Ordered, Adjudged and Decreed that the defendants recover costs in the amount of \$1295.42.

Judgment Rendered this 23rd day of January, 1950.

/s/ LOUIS GOODMAN,

United States District Judge.

Entered in civil docket Jan. 24, 1950.

Lodged January 17, 1950.

[Endorsed]: Filed January 23, 1950.

[Title of District Court and Causes.]

ORDER DENYING PLAINTIFFS' MOTION
FOR A NEW TRIAL

The motion of the plaintiffs for a new trial herein having been argued, briefed and submitted for decision, now upon due consideration thereof, it is Ordered that the said motion be and the same is hereby denied.

Dated: March 15, 1950.

/s/ LOUIS GOODMAN,
United States District Judge.

[Endorsed]: Filed March 16, 1950.

[Title of District Court and Cause.]

No. 25299-G and Consolidated Cases

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court:

You Are Hereby notified that the plaintiffs in the above-entitled consolidated actions do hereby appeal from the judgment heretofore entered herein, and from that certain order denying said plaintiffs' motion to retax costs herein, and from that certain order denying said plaintiffs' motion for new trial herein.

Dated: April 13, 1950.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

/s/ EWING SIBBETT,
Attorneys for Plaintiffs.

[Endorsed]: Filed April 14, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON
APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying exhibits, listed below, are the originals filed in this Court, or true and correct copies of orders entered on the minutes of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellants, to wit:

Complaint for Unpaid Overtime Compensation Under the Fair Labor Standards Act;

First Amended Complaint for Unpaid Overtime Compensation Under the Fair Labor Standards Act—Contains Exhibit A;

Amendment to First Amended Complaint for Unpaid Overtime Compensation Under the Fair Labor Standards Act;

Order for Consolidation;

Answer of Hawaiian Dredging Company, Limited, et al.;

Stipulation and Order for Consolidation;

Motion of Hawaiian Dredging Co. to Amend Answer;

Minute Order of May 22, 1947—Ordered Motion for Leave to File Amended Answers, etc., Granted;

Motion of Defendant Hawaiian Dredging Co. to Amend Answer;

Motion of Defendants Hawaiian Dredging Company, et al., to Amend Answer;

Stipulation Relative to Deposition of David A. McCabe;

Minute Order of June 5, 1947—Motion of Defendants to Amend Answer Granted;

Interrogatories—Direct—Redirect and Cross and Answers;

Notice of Motion;

Defendants' Motion that the Plaintiffs Motion to Reopen and Continue the Trial Be Denied Unless the Plaintiffs Shall Make a More Definite Statement and Affidavits as to the Grounds of Their Motion;

Minute Order of August 22, 1947—Ordered that Motion to Reopen Cause Be Granted for the Limited Purposes, etc., Further Ordered that the Order of Submission Be Vacated and Set Aside;

Order;

Notice of Motion for Leave to File Supplemental Complaint;

Notice of Motion for Rule to Produce Copies of Letters and to Reopen the Trial of the Above Consolidated Cases;

Affidavit of Ewing Sibbett in Support of Issuance of Subpoena Duces Tecum;

Order for Issuance of Subpoena Duces Tecum;

Civil Subpoena Duces Tecum;

Notice of Motion;

Affidavit of F. P. Foisie in Support of Motion to Quash Subpoena and Affidavit of C. Elmer Col-

lett in Support of Motion to Quash Subpoena and to Enlarge Time;

Motion to Quash Subpoena for Production of Documents;

Notice of Taking Deposition;

Request for Admissions and Exhibits;

Order Quashing Subpoena for Production of Documents;

Objections to Request for Admissions;

Minute Order of January 17, 1949—Ordered Plaintiff's Motion to Reopen Cause Denied, Ordered Cause Re-submitted on Briefs, Ordered Matter Continued for Submission;

Minute Order of February 28, 1949—Ordered Cases Submitted;

Opinion;

Minute Order of May 19, 1949—Ordered that Court's Opinion of May 31, 1949, Be Deemed to Be the Defendant's Proposed Findings of Fact and Conclusions of Law, Ordered Plaintiffs Be Allowed 20 Days to File Counter Findings, etc., Ordered Defendants Have 10 Days Thereafter to File any Written Objections Thereto;

Proposed Findings of Fact and Conclusions of Law—Lodged June 10, 1949;

Motion Re Findings;

Defendants' Objections to Plaintiffs' Proposed Findings of Fact and Conclusions of Law;

Motion of Defendant to Amend Answer;

Supplemental Opinion and Findings;

Motion for New Trial;

Notice of Hearing on Motion for New Trial;

Affidavit of Herbert Resner and Attached Exhibits;

Affidavit of Herbert Resner;

Judgment;

Disbursements;

Memorandum of Costs and Disbursements;

Notice of Motion and Appeal and Motion to Retax Costs;

Minute Order of February 6, 1950—Hearing on Motion to Retax Costs, Ordered Cost Bill Be Filed by United States, Further Ordered Motion to Strike Out 31 Docket Fees and Allowing 1 Docket Fee Be Granted;

Order Denying Plaintiffs' Motion for a New Trial;

Notice of Appeal;

Order Extending Time for Filing Record on Appeal and Docketing Appeal;

Designation of Record on Appeal to the United States Court of Appeals for the Ninth Circuit;

Additional Designation of Record on Appeal to the United States Court of Appeals for the Ninth Circuit;

Plaintiffs' Exhibits Nos. 1, 2, 3, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23;

Defendants' Exhibits Nos. A, A 1, A 2, A 3, A 4, A 5, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X and Y.

Plaintiffs' Exhibit No. 1 on Motion to Reopen Cause.

Reporter's Transcripts:

Vol. 1 No. 26536 G for May 22, 1947;

Vol. 2 No. 26536 G for May 23, 1947;

Vol. 3 No. 26536 G for May 27, 1947;

Vol. 4 No. 26536 G for May 28, 1947;

Vol. 5 No. 26536 G for May 29, 1947;

Vol. 6 No. 26536 G for June 3, 1947;

Vol. 7 No. 26536 G for June 4, 1947;

Vol. 8 No. 26536 G for June 5, 1947;

Vol. 9 No. 26536 G for June 6, 1947;

For November 5, 1947;

For November 29, 1948—Further Discussion on Motion to Reopen;

For January 17, 1949—Hearing on Motion to Reopen Cause;

In Case No. 26060-G—Martin H. Larsen, et al., Plaintiffs, vs. Flood Bros., a Corporation, et al., Defendants;

Complaint for Unpaid Overtime Compensation Under the Fair Labor Standards Act;

First Amended Complaint for Unpaid Overtime Compensation Under the Fair Labor Standards Act;

Amendment to First Amended Complaint for Unpaid Overtime Compensation Under the Fair Labor Standards Act;

Answer of Defendant Flood Bros. to First Amended Complaint and to Amendment to First Amended Complaint;

Motion of Defendant Flood Bros. to Amend Answer;

Motion of Defendant to Amend Answer;

In Witness Whereof, I have hereunto set my

hand and affixed the seal of said District Court this 7th day of June, A.D. 1950.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12571. United States Court of Appeals for the Ninth Circuit. Duane Moss, et al., Appellants, vs. Hawaiian Dredging Co., et al., Appellees. Martin H. Larsen, et al., Appellants, vs. Flood Bros., a Corporation, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 8, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

At a Stated Term, to wit: The October Term 1949, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the nineteenth day of June, in the year of our Lord one thousand nine hundred and fifty.

Present: Honorable William Denman, Chief Judge,
Presiding.

Honorable Homer T. Bone, Circuit Judge,

Honorable William E. Orr, Circuit Judge.

[Title of Cause.]

ORDER THAT CAUSE BE FIRST PRESENTED TO THIS COURT ON QUESTION OF CONSTITUTIONALITY OF ACT OF CONGRESS OF JULY 20, 1949, C. 352.

Ordered motion of appellants that cause be heard on typewritten transcript of record and typewritten briefs of appellants presented by Mr. Herbert Resner, counsel for appellants, and by Mr. C. Elmer Collett, Assistant U. S. Attorney, counsel for appellees, and submitted to the court for consideration and decision.

Upon consideration thereof, It Is Ordered that in this cause there be first presented to the Court the constitutionality of the Act of Congress of July 20, 1949, c. 352 (Public Law 177) 81st Congress, 1st Session; that appellants are granted ten days from date within which to file a new statement of points based on the question to be first presented

and designation of portions of record to be printed in support of such points; the appellees to have ten days thereafter to file counter-designation if so advised, and thereafter the cause to proceed on such question as provided by the rules of this court.

In the United States Court of Appeals
for the Ninth Circuit

No. 12,571

DUANE MOSS, et al.,

Appellants,

vs.

HAWAIIAN DREDGING CO., et al.,

Appellees.

MARTIN H. LARSEN, et al.,

Appellants,

vs.

FLOOD BROS., a Corporation, et al.,

Appellees.

Consolidated Cases, hereby referred to and made
a part hereof by number

AMENDED DESIGNATION OF RECORD ON
APPEAL AND STATEMENT OF POINTS
ON APPEAL

Come now appellants herein, by their counsel,
Messrs. Gladstein, Andersen, Resner & Leonard,
and Herbert Resner, and declare as follows:

I.

Designation of Record on Appeal

Appellants designate the following portions of the Clerk's Transcript as the record on appeal herein:

Moss, et al. v Hawaiian Dredging Co., et al.,
No. 25299-G

1. Complaint filed Nov. 14, 1945.
3. First Amended Complaint, including exhibit, filed Jan. 28, 1946.
4. Amendment to First Amended Complaint filed Oct. 8, 1946.
5. Order Consolidating this cause with Nos. 25300, 25301 and 25302 filed Nov. 6, 1946.
6. Answer filed Nov. 25, 1946.
8. Stipulation and Order for Consolidation of this cause with Nos. 26064, 26072, 26078, 26071, 26245, 26069, 26077, 27001, 26919, 26061, 26067, 26076, 26062, 26075, 26242, 26065, 26073, 26535, 26070, 26074, 26068, 26066, 26243, 26060, 26063, 26537, 26247 and 26536 in the files and records of the above-entitled Court filed April 30, 1947.
61. Motion of Defendants to Amend Answer filed September 12, 1949.
66. Supplementary Opinion and Findings of Judge Goodman filed November 28, 1949.
67. Plaintiffs' Motion for New Trial filed December 5, 1949.
71. Judgment filed January 23, 1950.
78. Order Denying Plaintiffs' Motion for New Trial filed March 16, 1950.
80. Notice of Appeal filed April 14, 1950.

Larsen, et al., vs. Flood Bros., et al.,

No. 26060-G

2. First Amended Complaint filed August 5, 1946.
8. Amendment to First Amended Complaint filed December 23, 1946.
9. Answer filed January 3, 1947.

II.

Statement of Points on Appeal

1. The District Court erred in upholding the constitutionality of the Act of July 20, 1949, c. 352 (Public Law 177) 81st Cong., 1st Sess. Said Act on its face and as construed and applied herein is unconstitutional.

2. The judgment of the District Court was contrary to law.

Respectfully submitted,

GLADSTEIN, ANDERSEN,
RESNER & LEONARD,

/s/ RICHARD GLADSTEIN,

/s/ HERBERT RESNER,

/s/ EWING SIBBETT,

Counsel for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed July 10, 1950.

[Title of Court of Appeals and Cause.]

COUNTER-DESIGNATION OF RECORD ON APPEAL

At the hearing before the Court of Appeals on June 19, 1950, the Court considered the procedure to be followed in this appeal. During the hearing, counsel for the appellants made several statements to the Court that are relied upon by the appellees in connection with the record to be printed on appeal.

Counsel for appellants there stated that the District Court based its judgment in favor of appellees on a number of separate complete defenses, one of which was the defense based on the Act of Congress of July 20, 1949, c. 352 (Public Law 177) 81st Congress, First Session. It was suggested that a decision on appeal with respect to this defense might dispose of the case. Counsel for appellants stated that a decision sustaining the constitutionality of that Act would dispose of their appeal herein, but that a decision holding that Act unconstitutional would not dispose of the case because of the alternative defenses sustained by the District Court. Counsel for appellant stated that they wished to preserve these other questions, which would be significant only if that Act were held unconstitutional, so that they could be considered in this appeal. It also appeared that much of the record would not be essential to a decision of the constitutional question and could be excluded from the printed record thereon. At the close of this hear-

ing the Court of Appeals ordered that the question of the constitutionality of that Act be first presented to the Court and that appellants be permitted to file a new statement of points based on that question and to file, with respect thereto, a designation of portions of the record to be printed.

In view of the proceedings summarized above and the order of the Court referred to herein recognizing that final judgment may be entered for the appellees if said Act is constitutional, appellees designate no additional portion of the record to be printed.

/s/ H. G. MORISON,
Assistant Attorney General.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ EDWARD H. HICKEY,
Special Assistant to the Attorney General.

/s/ MARVIN C. TAYLOR,
Special Attorney, Department of Justice.

/s/ C. ELMER COLLETT,
United States Attorney.
Attorneys for Appellees.

[Endorsed]: Filed July 25, 1950.

No. 12,571

IN THE

United States Court of Appeals
For the Ninth Circuit

DUANE MOSS, et al.,

Appellants,

VS.

HAWAIIAN DREDGING Co., et al.,

Appellees.

MARTIN H. LARSEN, et al.,

Appellants,

VS.

FLOOD BROS., etc., et al.,

Appellees.

APPELLANTS' OPENING BRIEF.

GLADSTEIN, ANDERSEN, RESNER
& LEONARD,

HERBERT RESNER,

RICHARD GLADSTEIN,

EWING SIBBETT,

240 Montgomery Street, San Francisco 4, California,

Attorneys for Appellants.

FILED

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No. 12,571

IN THE

**United States Court of Appeals
For the Ninth Circuit**

DUANE MOSS, et al.,

Appellants,

vs.

HAWAIIAN DREDGING Co., et al.,

Appellees.

MARTIN H. LARSEN, et al.,

Appellants,

vs.

FLOOD BROS., etc., et al.,

Appellees.

APPELLANTS' OPENING BRIEF.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the District Court of the Northern District of California, Southern Division (Judge Louis E. Goodman), deciding in favor of appellees and against appellants certain claims of the latter for overtime compensation under the Fair Labor Standards Act of 1938. (Act of June 25, 1938, C. 676, 52 Stat. 1060, 29 USC §§ 201-219.) (R. 61.)

Originally the case was tried upon its merits and decided in favor of appellees upon certain good faith defenses under the Portal-to-Portal Act of 1947 (Act of May 14, 1947, C. 52, 61 Stat. 84, 29 USC §§251-262). After the case was concluded, the submission was set aside and the case reopened for the purpose of allowing additional evidence. Meantime, Public Law 177 of the 81st Congress, 1st Session, was adopted. (Act of July 20, 1949, C. 352.) On the basis of this statute the trial Court held that irrespective of other considerations the appellants' claims were retroactively wiped out, and entered a supplemental opinion and findings in that respect. (R. 52-55.)

Appellants' motion for a new trial was duly made (R. 56-60) and denied. (R. 63.) Appellants appealed to this Court. (R. 63.)

JURISDICTIONAL STATEMENT.

Jurisdiction of this Court to hear this appeal is conferred by 28 USC §1291.

QUESTION PRESENTED.

There is presented to this Court for determination at this time a single question: The constitutionality of the retroactive feature of Public Law 177.¹ (R. 70.)

¹The text of the statute follows:

Chapter 352—Public Law 177
[H. R. 858]

An Act to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Section 7 of the Fair Labor Standards Act of 1938, as amended, is amended by adding at the end thereof a new subsection (e), to read as follows:

“(e) For the purpose of computing overtime compensation payable under this section to an employee—

(1) who is paid for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the workweek, at a premium rate not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days, or

(2) who, in pursuance of an applicable employment contract or collective bargaining agreement, is paid for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), at a premium rate not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek,

the extra compensation provided by such premium rate shall not be deemed part of the regular rate at which the employee is employed and may be credited toward any premium compensation due him under this section for overtime work.”

Section 2. No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to the date of enactment of this Act, if the compensation paid prior to such date for such work was at least equal to the compensation which would have been payable for such work had the amendment made by section 1 of this Act been in effect at the time of such payment.

Approved July 20, 1949.

SPECIFICATION OF ERRORS RELIED UPON.

- (1) Public Law 177 on its face and as construed and applied herein insofar as its retroactive feature is concerned, is unconstitutional.
 - (2) The District Court erred in upholding the constitutionality of the retroactive feature of Public Law 177.
-

SUMMARY OF ARGUMENT.

Eliminating from consideration at this time the good faith defenses sustained by the Court below, appellants herein would have been entitled to a judgment on their complaint under the decision of the United States Supreme Court in the controlling case of *Bay Ridge Operating Co. v. Aaron* (1948), 334 U.S. 446, 68 S. Ct. 1186, 92 L. Ed. 1502, were it not for the passage of Public Law 177.

Public Law 177 constitutes a legislative attempt to retroactively wipe out appellants' claims which otherwise must have been paid, and to reverse the Supreme Court decision in the *Bay Ridge* decision.

Public Law 177, therefore, constitutes judicial action by the Congress of the United States in plain violation of the Constitution, Article III, which provides:

“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”

It is not the prospective application of Public Law 177 with which we are here concerned. We concede that Congress has the power to amend this statute prospectively, as it has done. Here, however, the overtime compensation rights of these appellants under the Fair Labor Standards Act of 1938 had become vested and their claims had been held compensable under the *Bay Ridge* decision. Congress, therefore, was without power to destroy or take away these vested rights to overtime compensation otherwise payable.

What we have in Public Law 177 is litigation by legislative decree, rather than judicial determination. Such a procedure is incompatible with the command of the Constitution.

ARGUMENT.

I

BACKGROUND AND PRELIMINARY CONSIDERATIONS.

There are involved in this case claims for overtime compensation on behalf of a number of longshore walking bosses (a boss in the longshore industry who oversees the work of longshore gangs aboard a ship) and a number of allied workers in the longshore industry under the Fair Labor Standards Act of 1938.

The longshore industry has never operated on a regular basis so far as daily hours of work are concerned. The comings and goings of vessels, the weather, the running of the tides, conditions in port,

and the demands of the trade could not depend upon regular daytime hours common to most industries.

Accordingly, longshoremen have always worked at nighttime and on Saturdays, Sundays and holidays, when almost all other industries did not work. Longshoremen worked, and continue to work, whenever there is work to do. It came to pass that night work and work on Saturdays, Sundays and holidays constituted regular working hours in the longshore industry. Workers were paid a higher rate for this kind of work than they were for daytime and weekday work; obviously because it was more dangerous, difficult and unpleasant to work at hours other than daytime and weekday hours.

The Supreme Court recognized these facts in *Bay Ridge*, supra, 334 U.S. 455-456:

“* * * Employment in the longshore industry has always been casual in nature. The amount of work available depends on the number of ships in port and their length of stay and is consequently highly variable and unpredictable, from day to day, week to week, and season to season. Longshoremen are hired for a specific job at the ‘shape,’ which is normally held three times a day at each pier where work is available. The hiring stevedore selects the men he desires from the longshoremen who are present at the ‘shape’; in some instances a group of longshoremen are hired together as a gang. The work may last only for a few hours or for as long as a week. Although some work is carried on at all hours, the stevedoring companies, since operations are then carried

on at less cost, attempt to do as much work as possible during the straight time hours.

“The court further found that the rate for night work and holiday work had been higher than the rate for day work since at least as far back as 1887, and that since 1916, when the first agreement was made with the International Longshoremens Association, the differential was designed to shorten the total number of hours worked and to confine the work as far as possible within the scheduled forty-four hours. Despite the differential, many longshoremen were unwilling to work at night. Although some longshore work was required at all hours, except Saturday night, the District Court found that the differential had been responsible for the high degree of concentration of longshore work to the contract straight time hours.”²

²See also Edward E. Swanstrom, *The Waterfront Labor Problem*, Fordham University Press, 1938.

Marvel Keller, *Decasualization of Longshore Work in San Francisco*, Works Progress Administration, National Research Project, Report No. L-2, April 1939.

The employers themselves asserted that there was no “true overtime” in the longshore industry. Thus at the Congressional hearings on Public Law 177 the writer of this brief quoted from testimony of West Coast employer representatives at various hearings in the industry. See *Hearings before a Subcommittee on Labor and Public Welfare, United States Senate, Eighty-first Congress, First Session, on S. 336 and H. R. 858*, pp. 536-537:

“Frank P. Foisie, then an official of the WEA of San Francisco, sent a letter dated October 24, 1929, to Capt. W. J. Petersen, general manager of Waterfront Employers Union. The letter says:

“No such arbitrary restrictions of hours is practiced aboard ship. The effect of a restriction of port hours will be to have shore and ships operations working against each other. We should like to call attention to some equally ill-fitting longshore customs which have been unwisely carried over from shore industries. One of them is the third party (vessel lia-

The work performed at these undesirable times being regular work, the rates of pay at which men were compensated for doing this work became *regular rates of pay*. The fact that the rate of pay might have been one and one-half times the rate for daytime work did not make the rate for nighttime, Saturday,

bility) exposure to suit to which ships are exposed under the Longshoremen's and Harbor Workers Compensation Act. Another is the practice of overtime wage which in industry is true overtime beyond 8 hours but which in longshoring is nighttime payment.'

"That letter appears in the proceedings of the National Longshoremen's Board, San Francisco, Friday, August 17, 1934, at page 524.

"On Friday, August 24, 1935, volume 12, page 889 of the same proceedings. Mr. Foisie testified:

" 'Question (Mr. Phleger). The overtime rate represents, do I understand, not worked (sic) performed after a specified number of hours, but work performed after 5 p.m., and during the noon hour, and on holidays?

" 'Answer (Mr. Foisie). That is more accurately described at (sic) *nighttime rate*. *There is practically no true overtime in longshoring*; that is, true overtime as adopted by the factory industries. Time in excess of 8 hours is the conventional overtime. *Nothing of the sort pertains to longshoremen.*' [Our emphasis.]

"Mr. Phleger in arguing the case for the employers stated:

" 'That overtime in longshoring does not represent a wage payable for work in excess of 8 hours but is in substance a *nighttime rate covering all work performed after 5 p.m.* In consequence of the large amount of overtime actually paid, the average wage received by longshoremen is substantially in excess of the base wage, being approximately 95 cents per hour in the various ports.' [Our emphasis.]

"In the 1941-42 wage arbitration in which the arbitrator was a member of this committee, Senator Morse, this testimony appears at page 1728 of the record:

" 'Question (Mr. Melnikow). Do you know of any group with which you have compared the longshoremen's hourly earnings that shows a percentage of 57 percent overtime?

" 'Answer (Mr. Foisie). *No; because of course the overtime in other industries is not the same basically as it is in our industry. In our industry it is a misnomer. It is the period of*

Sunday and holiday work an overtime rate. It became, rather, a *regular rate* for work at *these times*.

During all of the years from 1938 until the advent of Public Law 177 there was a practice in the longshore industry on the part of employers to pay the longshoremen the one and one-half time rate, or even higher rate, for nighttime, Saturday, Sunday and holiday work. Special higher rates were also paid for working dangerous or noxious cargo (penalty rates), or for skill or special classifications. This was designated in contracts between the unions and the employers as an overtime rate, but in truth it was a regular rate for the times or cargo worked.

As far back as 1943 the courts recognized work performed at such times and on such cargo as "regular work" and the rates of pay in such situations "regular rates of pay," on the basis of which the men were entitled to overtime compensation under the Fair

day or night in which the work is done. That is peculiar to this industry and it is not common to others. [Our emphasis.]

"Question. Do you know of no other agreements which specify that work during certain hours shall be paid at straight time and that all other work outside of those hours shall be overtime?"

"Answer. There are some industries that have a slight differential for evening work and a heavier one for after midnight, but I don't know of any other industry that operates as we do."

"At page 670 of the same arbitration Mr. Foisie testified:

"Question. Since the period ending September 1936 will you state, Mr. Foisie, whether there has been a trend in the direction of a greater amount of overtime work or less?"

"Answer. Much greater and steadily so until now there is more overtime work, so-called, which, of course, is *largely a misnomer*. It is not overtime any particular spread of time, but largely the time of day worked.' [Our emphasis.]"

Labor Standards Act of 1938. *International Longshoremen's Ass'n, Local 815, et al. v. National Terminals Corp.* (DC ED Wisc. 1943), 50 F. Supp. 26, in a well reasoned opinion Judge Duffy says at page 29:

“The statute uses the term, ‘the regular rate at which he is employed.’ We must determine the regular rate at which each of the plaintiffs was employed. The higher rate for night, Sunday and holiday work is just as much a regular rate as the lower rate for daytime work. The higher rate was merely an inducement to accept employment at times which were not as desirable from a workman’s standpoint. Therefore, if any of the plaintiffs worked part of the week at daytime labor in the warehouse and another part of the week at nighttime labor unloading a boat, and the balance of the week at nighttime Sunday labor in the warehouse, the contract rates specified for each of these types of work is the regular rate at which that plaintiff was employed.”

The decision was affirmed by the Seventh Circuit.

Cabunac v. National Terminals Corp. (CCA 7, 1944), 139 F. (2d) 853, at 854, where the court said:

“It seems evident to us, as it did to the District Court, that the ‘overtime’ rate was merely the higher rate necessary to induce defendant’s employees to accept employment at hours which were not very desirable from a workman’s standpoint, and that this rate is the ‘regular rate’ to be paid for work on the night shift, on Sundays, and on certain holidays, within the meaning of the Fair Labor Standards Act.”

A like conclusion was reached by Judge Cooper in *Ferrer v. Waterman SS Co.* (DC Puerto Rico 1947), 70 F. Supp. 1, at page 4:

“* * * They did not provide for the payment of overtime for the extraordinary hours, instead they specifically provided a series of regular or basic rates which fluctuated according to the time of day and the cargo handled, and bore no relation to hours worked in excess of forty. They were ‘the higher rate necessary to induce defendant’s employees to accept employment at hours which were not very desirable from a workman’s standpoint’ and were ‘the “regular rate”’ for those hours.”

And cf. *Roland Electrical Co. v. Black* (CCA 4, 1947), 163 F. (2d) 417.

Ultimately a number of longshoremen brought suits throughout the country for the overtime compensation they believed themselves entitled to under the FLSA for this nighttime, Saturday, Sunday, holiday, penalty cargo and skilled work. Ultimately this litigation found its way to the United States Supreme Court in the celebrated case of *Bay Ridge Operating Company, Inc., v. Aaron*, supra. The decision had been adverse to the men in the District Court (69 F. Supp. 956), but the Court of Appeals found in favor of the claims (162 F. (2d) 665).

The Supreme Court in that case decided that the nighttime, Saturday, Sunday, holiday, penalty cargo and skilled work was regular work in the longshore industry and that the rates of pay for same consti-

tuted regular rates and were not overtime rates. The Court held that the men were entitled to overtime compensation on such work after forty hours per week. The formula would be this: As to each week the total wages received by the worker is divided by the total number of hours worked during the week. He would probably have different rates of pay according to the times and cargo worked. Thus, daytime, weekday hours would have a different rate of pay than his nighttime hours, or his Saturday, Sunday, or holiday hours, or skilled or penalty cargo work. An average hourly rate would thus be determined. The worker would then be entitled to time and one-half that average hourly rate (which would be the regular rate) for all hours worked during the week in excess of forty hours. He would thus be entitled to the difference between the total wages he received for a particular week and the amount he should have had if his overtime had been computed on the basis just described. It was this formula which was declared to be the proper one by the Supreme Court in the *Bay Ridge* case. (334 U.S. pp. 459, 460.)

This decision was a blow to longshore employers and to various Government agencies which had encouraged employers to violate the statute in the face of warnings from the Wage-Hour Administrator.

As far back as October 1943 employers and Government agencies were on notice that the Wage-Hour Administrator considered the pay practices in the longshore industry violative of the Act. On October

15, 1943, he addressed a letter to Mr. Hubert Wyckoff, assistant deputy administrator for maritime labor relations, War Shipping Administration. That letter is on exhibit supporting the Motion to Reopen and is filed with Clerk of this Court and appears in the text of the hearings on Public Law 177. It follows:³

“Dear Mr. Wyckoff: A recent inspection of Luckenbach Gulf Steamship Co., 120 Wall Street, N. Y., has disclosed a situation which in my view constitutes violation of the overtime pay provisions of the Fair Labor Standards Act of 1938.

“The firm employs stevedores, checkers, and coopers. Under the terms of its employment agreement it pays them a stated rate for work performed between 7 a.m. and 4 p.m. (or between 8 a.m. and 5 p.m.) and a higher rate for work performed during any other times of the day, which under the employment agreement are termed ‘overtime’ hours. If, as sometimes happens, an employee works more than 40 hours in a workweek, the firm uses the lower daytime rate as a base for computing the overtime pay due to the employee under the Fair Labor Standards Act, even though some or all of the employee’s work may have been performed outside of daytime hours.

“The Fair Labor Standards Act required that hours worked in excess of 40 in a workweek must be paid for at not less than one and one-half times the employee’s regular rate of pay. When an

³*Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, Eighty-First Congress, First Session, on S. 336 and H. R. 858, pp. 362-363.*

employee is paid a stated rate for daytime work, and a higher rate for the same work performed outside of daytime hours, it is my opinion that the higher rate is not a part of overtime pay required by the act, but is fact is simply the regular rate of pay, and if the employee works more than 40 hours in a workweek, the hours in excess of 40 must be paid for at one and one-half times that higher rate. Where an employee has worked at two or more rates of pay in a given workweek, overtime pay under the act may be computed on the basis of one and one-half times the average obtained by dividing total earnings by total hours, but the requirements of the act are not met where the lower rate is used as a base and all payments above that base are offset against overtime pay.

“When the matter was brought to the attention of the firm it stated that its method of payment is common to every firm in the Nation in the same business, and that it is operating under a contract with the War Shipping Administration which prevents any changes in its wage-payment practices without approval of the Administrator of the War Shipping Administration. It is for this reason that I am bringing the matter to your attention and I shall be glad to have any comments or suggestions you care to make. In addition to the responsibilities the act imposes upon me as Administrator, it also authorizes any employee to file his own suit, and, if successful, to recover double the amount of any unpaid overtime wages plus court costs and attorney fees. The possibility of employee suits is ever present and emphasizes the need for prompt action on

the part of employers to bring their practices into conformity with the act.

“Very truly yours,
“L. Metcalfe Walling,
Administrator.”

At the hearings described, in which Senators Hill, Morse and Withers sat as a sub-committee, Mr. Max Halpern, Attorney for the United States Maritime Commission, appeared to testify in favor of the retroactive provision of Public Law 177. The record of that hearing clearly demonstrates that government officials were well aware of the Wage-Hour Administrator's opinion that the pay practices in the longshore industry were violative of the law, and longshore employers were also aware of the fact. These longshore employers, therefore, sought and obtained indemnity agreements. Army, Navy and other government officials ignored the Wage-Hour Administrator's opinion and embarked upon an application of their own interpretation of the law.⁴

⁴The following revealing colloquy occurred at the hearings:

“Senator Morse. Now, Mr. Halpern, this explanation of yours has been very clarifying as to your reaction, not only of the War Shipping Administration, but apparently the reaction of all of the Government agencies, Navy, Army, Procurement, eventually the Department of Justice, as to the position which the Administrator took in regard to his interpretation of the meaning of the Fair Labor Standards Act in regard to rates of pay. Now, check me very carefully.

“Am I to draw the inference and conclusion from your testimony on this point that after the letter of October 15, 1943, from the Administrator to Mr. Wyckoff of the War Shipping Administration was received, there followed a series of conferences, not only between War Shipping and the Administrator, but between and among War Shipping and Army and

The fact remains that the longshoremen were entitled under the law to the rates of pay determined by the formula approved in *Bay Ridge*. Attorneys

Navy and Procurement and even the Department of Justice as to the effects, potential effects of the position of the Administrator as set out in his letter of October 15?

"Mr. Halpern. Quite correct.

"Senator Morse. Is it also correct for me to conclude that the Administrator remained adamant in all of these conferences, insisting that his interpretation of the act as set out in the letter of October 15, 1943, was the interpretation that the Wage and Hour Division was going to stand on?

"Mr. Halpern. I assume so.

"Senator Morse. Is it correct also to infer because of this adamant position and because not even the Department of Justice could persuade him to the contrary, nor Judge Patterson, then Under Secretary of War, or anybody in the Navy, that the stevedoring companies themselves, apparently aware of this situation, became greatly concerned and came to War Shipping and said, in effect, 'Now, look here, we have got to have some protection, we can't go ahead and build up these possible liabilities unless the Government is going to indemnify us for any losses we may suffer from an ultimate adverse decision.'

"Mr. Halpern. I don't know that all the assumptions you have included are actually correct. I don't know how many stevedoring companies had actual knowledge of all this. I think comparatively few. They were represented by an association, the association acted for them, or perhaps by a stevedoring committee. I don't know actually which.

"This stevedoring committee did appear for the stevedoring companies and perhaps the stevedoring committee is the one that had this knowledge and made the representations to the War Shipping Administration that protection was necessary.

"Senator Morse. I understand your testimony to be that representations were made to WSA that caused you to fear that you weren't going to be able to continue with this stevedoring work unless some guaranty could be given to the companies that they would stand no losses as a result of a possible adverse decision.

"Mr. Halpern. Yes. We have in our files a communication from the Waterfront Employers Association and another from, I believe, the New York Shipping Association, in which that point is more or less made. They wanted protection.

"Senator Morse. It is true then, is it not, Mr. Halpern, that the Walling letter and these many subsequent conferences

and others in the Department of Justice, Maritime Commission, Army and Navy, who had advised long-shore employers to the contrary, were found to be

caused so much consternation among the Government agencies that they became fearful that there might be an interference with stevedoring operations unless some agreement by way of indemnity could be given?

"Mr. Halpern. I gather that from reading the record.

"Senator Morse. And that the Department of Justice was so convinced that the Administrator was wrong in his interpretation of the law that it said to the Government agencies, 'We will be very glad to represent these agencies in defense of any claims made by anyone under the interpretation of the Administrator'; is that in essence the position of the Department of Justice?

* * * * *

"Senator Morse. So as one of the results of this series of conferences that ended in no agreement with the Administrator, we finally got into court with this issue and the United States Supreme Court in effect said that the Administrator is right and you fellows are wrong; isn't that it?

"Mr. Halpern. Yes, sir.

"Senator Morse. You want me as a Member of the Senate of the United States to reverse the United States Supreme Court with such a record of controversy and notice and understanding on the part of the parties to this case? I think that would be unconscionable.

"Mr. Halpern. I don't think so.

"Senator Morse. How in the world could we ever justify that as a Congress in this limited case—what I am saying hasn't got anything to do with a lot of other employers that aren't involved in this dispute—but if the Congress of the United States ever starts laying down a doctrine that we are going to be a super Supreme Court and retroactively change a law that we passed in 1938, I don't know how you could have government by law in this country. You would have government purely by political pressures. [Our emphasis.]

"Mr. Halpern. The Wage and Hour Administrator is before this committee in support of this bill prospectively.

"Senator Morse. What has that got to do with the legal right about which notice was given in 1943, with what the Supreme Court has ruled in fact to be legal rights under the Wage and Hour Act? If we ever start doing that to American employers in this country, going back and retroactively taking away some vested right that they got under a statute, what a

wrong. They thereupon set about to correct their conscious legal error by legislative fiat. Having lost the case in the Courts, they now proceeded to get the

howl would go up over that kind of a proposition. I am aghast at this." [Our emphasis.]

At the same hearing Senator Morse made the following pertinent statements, p. 369:

"Senator Morse. What does the last comment of yours have to do at all with the question as to whether or not you gentlemen in these various Government agencies were wrong in regard to your interpretation of the law as to what constituted overtime?

"Don't get me wrong. I don't like the idea of windfalls either and I don't like the idea of a lot of uncertainty in the law as to what pay rates are going to be. But that is quite a different thing from this. With all this notice, all this controversy, with adequate time for people to protect themselves, even including insurance protection, they come in now and say great injustice has been done us by the Supreme Court decision because the Supreme Court decided the law in accordance with what the Administrator on this particular point said it was, and we thought the Administrator was wrong.

"I say that, Mr. Halpern, right in the face of your testimony, that you feared a work stoppage if you followed the Administrator's decision, or his notice, in 1943.

"Well, maybe paying the longshoremen more wages would have resulted in a work stoppage, but that hasn't been my experience on the waterfront.

"You said that it would cause inflation. It wasn't for you gentlemen, I may say most respectfully, in War Shipping and the Army and Navy to be passing judgment on matters of policy concerning inflation. There were other agencies that had control of that. Your job was to carry out the law and run whatever risks were involved if you didn't carry it out.

"You said it would increase costs. That in my judgment was of no concern to you if you were trying to decrease costs by taking away legal rights that people had under the law.

"You say that you discussed these pay practices with employers and got the impression that that is what they wanted, as well as what the unions wanted, and my question is: So what? We are dealing here with a question: What are the legal rights? What are these men entitled to?

"Now, I have some more questions later of other witnesses as to what effect the union contract may have had on the indi-

Congress to do what the Supreme Court refused to do. But not only did they ask the Congress, and successfully, to change the situation with respect to the future, they asked Congress to *retroactively* change the situation to support the position they had asserted from the outset!⁵ They asked Congress by legislative

vidual stevedore, the individual employee. That is another story, separate and distinct from what we are pressing on now.

"You tell me that not even Patterson could convince Walling he was wrong and not even the Attorney General could convince him he was wrong. I wish we had more Government officials that would stand up against that sort of opposition and still say, 'I think this is what the law is and we will leave it for the Supreme Court to decide.'

"The Supreme Court decided it, and I need to go and take a walk, because I am so confused now. I thought I had this thing thought through a few days ago, but I am so convinced, Mr. Halpern, by the testimony you have given here this morning—not only of the letter but of a series of arguments you had with the Administrator afterward, every conference apparently putting you on further and further notice that he intended to insist upon the law being applied in accordance with his October 15 letter—that I think you are estopped."

Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, Eighty-First Congress, First Session, on S. 336 and H. R. 858, pp. 366-369.

⁵At the same hearing Senator Morse voiced what we believe are pertinent objections to the retroactive feature of the law. The following appears:

"Mr. Halpern. At the same time, Senator Morse, I can't understand why the Wage and Hour Administrator who in fact guessed right, comes to this committee and supports this bill prospectively to clarify and correct a situation arising out of the Supreme Court's decision and yet does not take the same position with respect to retroactive relief on facts and under conditions precisely the same, the same agreement, the same parties.

"It seems to me if it is good enough for the future, it should be good enough for the past.

"Senator Morse. Of course, I think that is a remarkable statement. I don't know what is in the mind of the Administrator, but I tell you what would be in my mind on that one, sir. I am not committing myself to it as to what I finally will do on any phase of the case, but I am satisfied that the Wage and Hour Act needs to be amended. It needs to be amended

act to reverse *Bay Ridge*, and Congress proceeded to do so by enacting Public Law 177.

Therefore, what we find in the present case is this situation: A statute in force since 1938 which is clear and unambiguous with regard to hours of work and rates of pay; men in an industry who have worked long and hard and have not been paid according to the requirements of that statute and therefore who have earned and have coming certain sums of money; a decision by employers and Government officials to ignore the law and pay the longshoremen as they decided the law should be interpreted; a decision by the United States Supreme Court that the employers

so that employers and workers and everybody else don't have to live under the uncertainty that you had to live under, apparently, while this contest has been going on.

"But there is a great deal of difference between passing a law prospectively, making definite and certain what the policy should be in the future, and going back a few years and taking away from people what the United States Supreme Court has ruled happens to be their rights under the law prior to amendment. That is a strange way to amend the law, by taking away rights which the highest court in the country says have been vested in people. That frightens me.

"If the Supreme Court decision means that under that law these men are entitled to this pay as a matter of law, I don't see how I can justify casting a vote saying because it is going to be pretty hard on some employers I am going to take \$5 away from Joe Brown, a worker, and give to it John Smith, an employer. That is what it amounts to.

"Mr. Halpern. I need not tell you, Senator Morse, Congress has done just that in connection with portal-to-portal claims, and the courts have affirmed its constitutionality.

"Senator Morse. I don't think it has, but you and I could argue that legal point at great length. I think there are great differences between portal-to-portal pay and what is proposed here."

Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, Eighty-First Congress, First Session, on S. 336 and H. R. 858, pp. 370-371.

and these Government agencies were wrong and that the men should be paid as the law provided; an appeal to Congress to amend the law so as to wipe out the effect of the Supreme Court decision; action by Congress granting this request and wiping out the Supreme Court decision. The result: Government by legislative fiat rather than judicial action—a plain violation of Article III of the United States Constitution.

II

PUBLIC LAW 177 IS UNCONSTITUTIONAL.

(1) Public Law 177 on its face and as construed and applied herein insofar as its retroactive feature is concerned, is unconstitutional.

(2) The District Court erred in upholding the constitutionality of the retroactive feature of Public Law 177.

Public Law 177, 81st Congress, 1st Session, insofar as it attempts to wipe out existing overtime claims validated by the Supreme Court in the Bay Ridge decision (*Bay Ridge Operating Co. v. Aaron*, 68 S. Ct. 1186) is clearly unconstitutional, on each of the following grounds:

A

The retroactive provision of Public Law 177 represents an attempt by Congress to exercise judicial power in violation of Article III of the Constitution of the United States.

The Supreme Court has unhesitatingly struck down attempts on the part of the legislature to invade the

judicial domain, to exercise power specifically forbidden to it by our basic law. *Kilbourn v. Thompson*, (1881) 13 Otto 168; *Oyden v. Blackledge*, 2 Cranch 272, 2 L. Ed. 276; *Reynolds v. McArthur*, 2 Peters 417, 7 L. Ed. 470; *United States v. Klein*, (1872) 13 Wall. 128, 20 L. Ed. 519; *Baltimore & Ohio R. R. Co. v. U. S.*, (1936) 298 U.S. 349, 80 L. Ed. 1209.

In *Prentis v. Atlantic Coastline Co.*, (1908) 211 U.S. 210, 226, 53 L. Ed. 150, 158, Justice Holmes stated:

“A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.”

Here, then, is the test to be applied. Does the action of Congress in the passage of Public Law 177 look solely to the future and change existing conditions “by making a new rule to apply thereafter to all or some part of those subject to its power,” or does it also purport to declare and enforce liabilities as they stand on facts and under laws existing at the time of the adoption of that legislation? Does it define a proper course of conduct for the future, or does it also pass judgment on and prescribe a new rule for decisions in pending cases?

The answer is clear. The retroactive provision of Public Law 177 does “declare liabilities * * * on present or past facts”; it not only declares “what the

law is''—but also what the law was as to liabilities incurred long before the Act was passed; it determines the sum payable to appellants by the appellees under the employment relationship in existence prior to its adoption. This retroactive provision operates in precisely the sphere in which only the Courts can take—and have taken—action.

In its decision in the *Bay Ridge* case, the United States Supreme Court construed the provisions of the Fair Labor Standards Act in relation to a particular employment situation. In doing this, the Court was exercising its normal judicial function of construing and enforcing the rights and liabilities of parties under existing law. Its decision in this regard is "final, and binding upon all other departments of that government and upon the people themselves until they see fit to change their Constitution," *Webster v. Cooper*, 55 U.S. 488, 14 L. Ed. 510. The 81st Congress has attempted to declare that this decision is not "final and binding." Congress lacks the constitutional power to thus reverse decisions of our highest court.

As the Court pointed out in *Kilbourn v. Thompson*, *supra*, the judicial and legislative functions cannot be identical if the doctrine of the separation of powers is to have any meaning. If the Courts are exercising judicial functions in construing the application of the Fair Labor Standards Act to past transactions, the Congress cannot perform that function as well. Either the determination of these liabilities is judicial or it is legislative. If it is legislative, then the Courts do not have power to render final decisions in these cases

at all. If it is judicial, then Congress has no constitutional authority to impose its will upon the judiciary.

It is clear that Congress, by the enactment of the retroactive provision of Public Law 177 has presumed to interfere with and to nullify the declaration and enforcement by the United States Supreme Court of liabilities as they stood on past facts. Congress did not, in passing Public Law 177, look solely to the future in order to change conditions and make a new rule to be applied thereafter. It also sought to change rules already laid down by the Supreme Court for a past period during which it had no competence whatsoever.

Cooley, at page 190, Volume I of his *Constitutional Limitations*, states the rule as follows:

“But the legislative action cannot be made to retroact upon past controversies and to reverse decisions which the court, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, for the legislature would in fact act as a court of review to which parties might appeal when dissatisfied with rulings of the Court.”

In Public Law 177 we are faced more clearly than at any time in American Constitutional history with precisely such an effort on the part of Congress to “act as a court of review to which parties may appeal when dissatisfied with rulings of the court,” and to

subject the judgments of the Supreme Court to re-examination and revision by Congress itself.

The effect of holding the retroactive provision of Public Law 177 constitutional would be enormous. In practically all cases arising under public laws, there is an interval during which the constitutionality, the meaning and effect of the law, and the extent of the rights and obligations it creates, are subject to judicial scrutiny. During this interval, the membership of Congress may change and the policies and purposes which motivated an earlier Congress may not find support in its successor. To permit that successor Congress to do what the 81st Congress here seeks to do would place a premium upon disregard of the solemn determinations of our highest Court. Litigants would be encouraged to continue to resist liabilities judicially determined, because of the possibility of these liabilities being vacated and set aside by later Congressional Act. The courts would thus be rendered merely intermediate bodies. A final appeal to Congress might always be made for relief from the effect of judicial decisions as to past transactions.

If the people of the United States desire to repose judicial power in Congress they may do so by adopting an appropriate constitutional amendment. Until the Constitution is so amended, however, this Court has no alternative but to apply the Constitution as it stands today, to recognize and insist upon adherence to the principle of the separation of legislative and judicial power, and to declare void the retroactive provisions of Public Law 177.

B

The retroactive provision of Public Law 177 is unconstitutional in that it deprives the appellants of their property without due process of law in violation of the Fifth Amendment.

The courts have unhesitatingly struck down attempted invasion of vested rights, attempted destruction by the Legislature of causes of action already accrued. And they have done so even where national policy and the immediate equities were on the side of the invading legislation.

Forbes Pioneer Boat Line v. Everglades Drainage Dist. (1922), 258 U.S. 338, 66 L. Ed. 647;
Osborne v. Nicholson (1872), 80 U.S. 654, 20 L. Ed. 689;

Steamship Co. v. Joliffe (1865), 2 Wall. 450, 17 L. Ed. 805;

Hathorn v. Calef (1865), 2 Wall. 10, 17 L. Ed. 776;

Ochiltree v. Iowa Railroad (1875), 21 Wall. 249, 22 L. Ed. 546;

Ettor v. City of Tacoma (1913), 228 U.S. 148, 57 L. Ed. 773;

Coombes v. Getz (1932), 285 U.S. 434, 76 L. Ed. 866;

Lynch v. United States (1934), 292 U.S. 571, 78 L. Ed. 1434;

Treigle v. Acme Homestead Association (1936), 297 U.S. 189, 80 L. Ed. 575;

Duke Power Company v. South Carolina Tax Commission (CCA 4, 1936), 81 F. (2d) 513;

National Surety Corporation v. Wunderlich (CCA 8, 1940), 111 F. (2d) 622;

Badger v. Hoidale (CCA 8, 1937), 88 F. (2d) 208;

Harrison v. Remington Paper Company (CCA 8, 1905), 140 F. 385, 390;

Knickerbocker Trust Company v. Myers (CC Pa. 1904), 133 F. 764, 767.

Public Law 177 raises squarely the important constitutional question whether Congress has the power to enact legislation the avowed purpose and effect of which is to destroy previously matured causes of action for unpaid overtime compensation and liquidated damages under the Fair Labor Standards Act. The constitutional question is a most important and far-reaching one. For if Congress has the power to destroy, as they have attempted to do in this instance, rights which have become vested in working people, there is nothing to prevent a future Congress of a different political complexion from taking similar action with reference to the vested rights of members of other economic groups.

Our constitutional prohibitions against retroactive legislation which destroys previously acquired rights lie in the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides that no person shall "be deprived of life, liberty or property without due process of law." Similarly, Section 1 of the Fourteenth Amendment provides "nor shall any state deprive any person of life, liberty or property without due process of law." It is well settled that these provisions of the Fifth and Fourteenth Amendments mean the same thing

and that precedents under the one are equally controlling as precedents under the other.

Curry v. McCanless (1939), 307 U.S. 357, 369, 83 L. Ed. 1341;

Bowles v. Willingham (1944), 321 U.S. 503, 518, 88 L. Ed. 892.

Congress in the exercise of its power must conform with the due process clause of the Fifth Amendment.

Louisville Joint Stock Land Bank v. Radford (1935), 295 U.S. 555, 589, 79 L.Ed. 1593;

Virginian Ry. Co. v. System Federation (1937), 300 U.S. 515, 558, 81 L. Ed 789;

Curriu v. Wallace (1939), 306 U.S. 1, 14, 83 L. Ed. 441.

Many Supreme Court cases have established the principles underlying the rule against retroactive legislation, and the basis for the exceptions to the rule. We will discuss only a few of the more important of these cases.

Coombes v. Getz (1932), 285 U.S. 434, 76 L. Ed. 865. The California Constitution provided that directors of corporations should be liable to creditors for all moneys embezzled or misappropriated by corporate officers. While creditors who had contracted with the corporation were suing a director to enforce their rights, this provision of the Constitution was repealed. The Court, in permitting the creditors to recover despite the repealing statute, stated (p. 442):

“The right of this petitioner to enforce respondent’s liability had become fully perfected and vested prior to the repeal of the liability provi-

sion. His cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right), * * *”, citing among many other cases, *Ettor v. Tacoma*, supra; *Hathorn v. Calef*, supra; *Steamship Co. v. Joliffe*, supra; *Ochiltree v. Railroad Co.*, supra; *Knickerbocker Trust Co. v. Myers*, supra.

In applying the general rule to the facts of this case, the Court stated (at page 448):

“Here both parties acted. The creditor extended credit to the corporation; and his action in so doing, under the state constitutional provision, brought into force for his benefit the constitutional obligation of the director, which, by becoming a director, the latter had voluntarily assumed and, thereby, in the eyes of the law created against himself a contractual liability in the nature of a suretyship. *Harrison v. Remington Paper Co.*, supra, p. 388. Doubts which otherwise might have existed in respect of the character and effect of the transaction are no longer open. It is settled by decisions of this and other federal courts (*Ettor v. Tacoma*, and cases cited in connection therewith, supra) that *upon the facts here disclosed, a contractual obligation*

arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. I, §10, and the due process of law clause in the Fourteenth Amendment, of the Federal Constitution.” (Emphasis added.)

Ettor v. Tacoma (1913), 228 U.S. 148, 57 L. Ed. 773. The State of Washington by statute required municipalities to compensate property holders for damages resulting from street grading. While these actions for damages under this statute were being heard, the statute was repealed. The District Court took the position that the right of action was statutory and fell with the statute. The Supreme Court reversed, holding (p. 156):

“The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. The obligation of the city was fixed. The plaintiffs in error had a claim which the city was as much under obligation to pay as for the labor employed to do the grading. It was a claim assignable and enforceable by a common-law action for a breach of the statutory obligation.

“The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. *This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a*

property right. Nothing remained to be done to complete the plaintiff's right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation." (Emphasis added.)

Hathorn v. Calef (1865), 2 Wall. 10. A state statute provided that stockholders should be liable for the debts of the corporation. A creditor sued a stockholder although the individual liability provision had been repealed two months after the debt was contracted. The Supreme Court held that by virtue of the statute, the stockholders "agree to become security to the creditors for the payment of the debts of the company, which have been contracted upon the faith of this liability"; and that the repealing act impaired the obligation of the contract.

Steamship Co. v. Joliffe (1865), 2 Wall. 450. A California statute provided that when a pilot went outside the harbor and offered his services to a vessel and the services were declined, the pilot was entitled to one-half pilotage fees. Pending recovery on a suit for one-half pilotage fees, the statute was repealed. It was claimed that recovery could not be had because the right was statutory and could therefore be taken away. The Supreme Court disagreed, holding (p. 807):

"The claim of the plaintiff below for half-pilotage fees, resting upon a transaction regarded by the law as *quasi contract*, there is no just

ground for the position that it fell with the repeal of the statute under which the transaction was had. *When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands, independent of the statute.* And such is the position of the claim of the plaintiff below in the present action; the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed.” (Emphasis added.)

Forbes Pioneer Board Line v. Everglades Drainage District (1922), 258 U.S. 338. A suit was brought for repayment of tolls collected for passage through a canal in the face of a statutory prohibition against such collection. On the day of the decision in that suit the Legislature passed an act purporting to validate those tolls and to destroy the plaintiff’s cause of action. Mr. Justice Holmes held that the legislative enactment was unconstitutional and the boat line could not be deprived of its right to recover the overcharge. He said (p. 340):

“Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right. It is hard to find any ground for saying that the promise of the law that the public force shall be at the plaintiff’s disposal is less absolute than it is when the claim is for goods sold. Yet no one would say that a claim for

goods sold could be abolished without compensation.”

It is well settled constitutional law that a legislature cannot enact a new or different statute of limitation which will have the effect of barring a cause of action which has already *accrued*.

Ochoa v. Hernandez (1913), 230 U.S. 139 (p. 161), 57 L. Ed. 1427, 1438:

“With reference to statutes of limitations, it is well settled that they may be modified by shortening the time prescribed, but only if *this be done while the time is still running, and so that a reasonable time still remains for the commencement of an action before the bar takes effect.*” (Emphasis added.)

Wheeler v. Jackson (1890), 137 U.S. 245, 34 L.Ed. 659, 663:

“It is the settled doctrine of this court that the Legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced, *provided, in each case, a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect.*” (Emphasis added.)

Appellants’ right to overtime compensation and liquidated damages under the FLSA is a vested right, contractual in nature.

Overnight v. Missel (1942), 316 U.S. 572, 86 L. Ed. 1682.

In *Brooklyn Savings Bank v. O'Neil* (1945), 324 U.S. 697, 89 L. Ed. 1297, the Court affirmed the position taken in the *Missel* case. In denying that rights under Section 16 (f) of the Fair Labor Standards Act could be waived, the Court held (p. 709) that the rights were of a "private-public character," and the "sole right to bring such suit was *vested* in the employee under Section 16(b)." (Emphasis added.)

In *Reid v. Solar Corporation* (DC ND Iowa 1946), 69 F. Supp. 626, the Court held that causes of action under the FLSA constituted property (p. 637):

"Existing actions constitute property within the meaning of constitutional guarantees and a legislature body cannot annul or destroy such rights of action. *State v. Louisiana Oil Refining Corporation*, La. App. 1937, 176 So. 686, 687, 691, 692. See also *Korisek v. Brigham*, 1926, 169 Minn. 57, 210 N. W. 622, 623, 49 A. L. R. 1260. An employee's claim for overtime compensation and liquidated damages under the Fair Labor Standards Act obviously constitutes property of which an employee may not be deprived without due process of law."

See also *Northwestern Yeast Co. v. Brousin* (CCA 6, 1943), 133 F. (2d) 628; *Hays v. Bank of America* (1945), 71 C. A. (2d) 301.

The proponents of the retroactive provisions of Public Law 177 claim that as the rights of the employees which are here invaded are statutory in nature, such rights can never be said to vest. But as evidenced by the cases just cited, such is not the law. These cases hold that a right or an obligation is not re-

moved from the protection of the Constitution merely because such obligation or such right would not have existed except for a particular statutory provision. There is no principle in our constitutional law which places non-statutory law on any higher plane than legislative enactment.

Thus in *Ettor v. Tacoma, supra*, we have seen that the right held to be constitutionally protected against retroactive legislation was the right to sue a municipality under the terms of a State statute. *No right to do so would have existed in the absence of that statute.*

Still the Supreme Court refused to allow the right to be retroactively destroyed. The Court stated simply and directly that the right "was fixed by law in force when their property was damaged for public purposes and the right so vested cannot be defeated by subsequent legislation." The fact that the "law in force" was statutory law had no effect whatsoever upon the Court's determination.

Similarly in *Coombes v. Getz, supra*, the obligation was statutory in precisely the same sense as the obligations under the Fair Labor Standards Act are statutory.

In *Steamship Co. v. Joliffe, supra*, the Supreme Court refused to accept the argument that recovery could be defeated by a subsequent statute because the original right was "statutory."

Likewise in *Hathorn v. Calef, supra*, and *National Surety Corp. v. Wunderlich* (CCA 8, 1940), 111 F. (2d) 622, rights were protected against divestment by

retroactive legislation although in each case they were founded exclusively upon statute.

There is no distinction between these cases and the cases at bar. No obligation would have existed here if the Fair Labor Standards Act of 1938 had never been adopted. But similarly, in the cases we have cited, there would have been no obligation if the statutes there involved had never been passed.

If we examine the few cases in which the Courts have held that the statutory rights there involved did not vest, and could be defeated by a repeal of the statute which created them, we shall see clearly that entirely different circumstances were involved. These exceptional cases fall into several classes in all of which there are factors wholly absent in the cases at bar.

1. Where a right based upon a statute is purely executory, is entirely conditioned upon an eventuality which has not materialized at the time that the statute is repealed, such repeal and the removal of the right have been held to be valid. Thus, in *Pearsall v. Great Northern R. Co.* (1896), 161 U.S. 646, 40 L.Ed. 838, it appeared that the Legislature had adopted a statute removing the power of a corporation, originally granted by its charter, to consolidate with other lines. Thereafter, the corporation sought to engage in a consolidation and was prevented from doing so by the operation of the later statute. The Court held that under these circumstances no vested rights had been disturbed since the power to consolidate had not been exercised at the time the repealing Act was passed.

In the cases at bar, the appellants have rendered to their employer the services upon which their right to compensation is based. They are not objecting to the deprivation of their right to claim similar compensation for services to be rendered in the future. They are objecting to the deprivation of their rights as to past transactions.

2. An inchoate right to maintain an action or to secure a benefit for which no consideration has been given may be avoided by legislation even while a suit is pending. Thus, in *Western Union Telegraph Co. v. Louisville & Nashville R. R. Co.* (1922), 258 U.S. 13, 66 L. Ed. 437, a telegraph company, acting under a statutory authority, brought a condemnation proceeding in which it sought to secure the property of a railroad company. After judgment had been rendered for the telegraph company, and pending appeal, the Legislature passed another statute repealing the right of condemnation in such a case. The Court here upheld the statute on the ground that the right created was merely the *right* to bring an action. The telegraph company had done nothing to earn the power sought to be exercised; it had given no consideration for the right it claimed. Under these circumstances the Court held that "no rights had so far vested in the telegraph company as to preclude a change of policy or legislation which affected it."

This principle, too, has no application to the instant cases, because here the workers have given consideration, i.e., their physical labor, for the right granted by the statute.

3. On the same basis it has been held that there is no vested right to the collection of a statutory penalty. For example, in *Norris v. Crocker*, 13 How. 429, a suit for a penalty payable under the Fugitive Slave Law of 1793 to a slave owner by a person who had harbored, rescued or obstructed the arrest of a fugitive slave was held not to be maintainable after the provision for the penalty had been repealed, even though the suit was commenced prior to the repeal. The Court pointed out that the penalty was payable regardless of loss or injury and accordingly no right could vest therein. And in *Maryland v. Baltimore & Ohio R. R. Co.*, 3 How. 534, 11 L.Ed. 714, the repeal of a State law providing for the forfeiture of a certain amount of money was held to deprive no one of any vested rights since "being a penalty imposed by law, the legislature had the right to remit it." This doctrine is closely related to that involved in the *Western Union* case. For, obviously, the payment of a *penalty* by its very terms imports an absence of consideration.

But in the present cases no such situation is presented. The compensation sought by the appellants is *not* a penalty. In *Brooklyn Savings Bank v. O'Neill*, *supra*, p. 707, the Supreme Court laid to rest any suggestion that the overtime or liquidated damage provisions of the Fair Labor Standards Act are in the nature of a penalty, stating:

"We have previously held that the *liquidated damage provision is not penal in its nature* but constitutes compensation for the retention of a workman's pay which might result in damages

too obscure and difficult of proof for estimate other than by liquidated damages. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 86 L.Ed. 1682, 62 S.Ct. 1216. It constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency, and general wellbeing.' Employees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their wellbeing and efficiency until such sums are paid at a future date." (Emphasis added.)

4. Again flowing from the principle that a right does not vest where a claimant has suffered no injury and has given no consideration for the enjoyment of the privilege claimed, it has been held that there is no vested right in a governmental gratuity. Thus in *In Re Hall*, (1897) 167 U.S. 38, 42 L.Ed. 69, it appeared that a judgment had been entered in a certain amount by the Court of Claims under an Act of 1895. An appeal was taken to the Supreme Court of the United States where the judgment was reversed on the grounds that the Court of Claims had improperly included interest in determining the amount due to the claimant. An application was then made for entry of judgment on the mandate of the Supreme Court and pending consideration of this application, Congress passed a statute repealing the Law of 1895 and abolishing the claim.

The Court held that the application for judgment was properly denied since:

“This Court had just decided that the act of February 13, 1895 (28 Stat. at L. 664, Chap. 87), simply conferred a gratuity upon the persons covered by its provisions; that *there was no element of a legal or an equitable claim in their favor* against the municipal authorities of the District, but that *the act provided for a gift which was wholly without consideration.*” (Emphasis added.)

Obviously the appellants here do not seek the vindication of a right founded upon a governmental bounty. The right they seek to enforce is based upon services rendered by them for their employers.

5. Finally, there are a variety of situations in which retroactive statutes invade no rights at all. Such statutes may (a) alter the form of the remedy without impairing the right, without removing all legal avenues for securing its enforcement; (b) ratify acts of the Government unlawful when performed; (c) provide a remedy for a moral obligation of the Government (the gratuity cases in reverse); (d) allow the enforcement of a right where, for some technical reason, the existing method of enforcement may not be available; or (e) legalize express contracts unlawful when made, and thus serve to prevent individuals from taking advantage of their own unlawful conduct at the expense of their partners in illegality.

We have discussed the limits of the rule that in certain special instances statutory rights may be retroactively vacated. The rationale behind these decisions is that there was no right which vested. There

was no damage which by law should be repaired. But a right which is not based upon the bare statute itself, a right which is based upon acts performed under the statute, upon consideration given in accordance with the terms of the statute, cannot be subsequently impaired. What the Supreme Court considers of importance in cases involving a statutory right is whether or not all steps necessary to perfect the right have been taken in each case. In the *Ettor* case the plaintiffs had suffered the damage described in the statute. In the *Joliffe* case the plaintiff had offered his services and had thus performed the act entitling him to the recovery. In the *Coombes* case the plaintiff had complied with the condition necessary to establish the defendant's liability in that he had extended credit to a corporation of which defendant was a director. In each of the remaining cases cited, the plaintiffs had similarly done everything required *under the statute* to perfect their statutory claims. In the instant cases the appellants have likewise performed all of the acts necessary to establish their right to recovery under the Fair Labor Standards Act. They have contributed their time and energy to their employer for his gain. They have engaged in compensable work. They have *earned* the right to the compensation prescribed by the FLSA. Just as in *Ettor v. Tacoma, supra*, when the "amending" statute was here passed, "nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage." What the Courts are saying, in effect, is that

a particular session of a legislature cannot fetter or impair the accomplishments of its predecessors as to past facts. It cannot reach back to a time when it was not in existence at all and nullify for that time what its predecessor has done. The 81st Congress cannot act as though it were the 75th Congress. It cannot lay down rules of conduct for a period during which not it, but previous Congresses, were in session. It cannot upset rules of conduct or alter rights and obligations which arose during a period in which it had no existence and no constitutional competence whatsoever.

Not only has the 81st Congress in this instance sought to change the Fair Labor Standards Act as it was in force during previous sessions, but it is also attempting to veto a decision of the United States Supreme Court. If such a result can be accomplished, then vested rights will never be secure.

C

The gold clause cases are inapplicable.

Proponents of the retroactive provision of Public Law 177 rely principally on the so-called "gold clause" cases. (*Norman v. Baltimore & O. R. Co.*, *U.S. v. Bankers Trust, etc.* (1935), 294 U.S. 240, 79 L. ed. 885). An examination of these cases, in the background of the critical situation which faced the Country at the time the legislation in question was passed by Congress, i.e., June, 1933, shows conclusively that they do not support the constitutionality of Public

Law 177. On June 5, 1933, Congress, faced with a grave economic and monetary crisis, passed a resolution which had the effect, among other things, of invalidating and rendering unenforceable all clauses in previously executed contracts requiring payment in gold. The Supreme Court upheld the constitutionality of this resolution on the ground that the existing contracts could not stand in the way of the paramount power of Congress under Article I, Section 8 of the Constitution "to coin money, regulate the value thereof, and of foreign coin." Obviously, because of the critical situation which existed at the time the law was passed, Congress could not effectively regulate the value of the currency in the face of a tremendous volume of private money obligations calling for payment only in gold of a stated weight and fineness, particularly when the entire credit and currency structure of the Country rested upon that particular medium of exchange. In the gold clause cases we have a direct and irreconcilable clash between private contractual rights and the power of Congress to regulate the currency. As Chief Justice Hughes stated, in page 316:

"We are concerned with the constitutional power of the Congress over the monetary system of the Country and its attempted frustration. Exercising that power, the Congress has undertaken to establish a uniform currency, and parity between kinds of currency, and to make that currency, dollar for dollar, legal tender for the payment of debts. In the light of abundant experience, the Congress was entitled to choose such

a uniform monetary system, and to reject a dual system, with respect to all obligations within the range of the exercise of its constitutional authority. The contention that these gold clauses are valid contracts and cannot be struck down proceeds upon the assumption that private parties, and States and municipalities, may make and enforce contracts which may limit that authority. Dismissing that untenable assumption, the facts must be faced. We think that it is clearly shown that these clauses interfere with the exertion of the power granted to the Congress and certainly *it is not established that the Congress arbitrarily or capriciously decided that such an interference existed.*" (Our emphasis.)

Thus in the gold clause cases the Court found that the contracts upon which it was claimed rights had vested, were in direct conflict with and in effect nullified and frustrated the power of Congress to determine the value of the Country's currency. There is no parallel in the cases at bar. The power exercised by Congress in enacting the Fair Labor Standards Act was one calculated to improve conditions of labor and was exercised under the commerce clause of the Constitution. By no stretch of the imagination can it be contended that a recovery of unpaid wages under the principles enunciated in the Bay Ridge decision would nullify or frustrate the power of Congress to regulate commerce.

The rationale of the gold clause cases has no application, therefore, to the cases at bar.

D

The cases upholding the constitutionality of the retroactive provisions of the Portal-to-Portal Act of 1947 are inapplicable.

We are, of course, familiar with the recent Circuit and District Court decisions upholding the retroactive application of the so-called "good faith" defenses provided in the Portal-to-Portal Act of 1947. These cases upheld the Act on two grounds: (1) That the rights involved were purely statutory and could, therefore, be divested retroactively; (2) That in its "Findings" prefacing the Portal Act, Congress "found" that a national emergency would result if the acquired rights were not divested, and therefore Congress had the inherent power to take steps to avert the emergency, even to the extent of divesting previously acquired rights.

On the "statutory rights" point, we have already shown that this is not a proper ground for permitting Congress to enact retroactive legislation.

As to the "emergency" point, these decisions are also erroneous. It is well settled constitutional law that the existence of an emergency does not warrant an exception being made to the general rule against retroactive legislation.

Home Bldg. and Loan Assn. v. Blaisdell,
(1934), 290 U.S. 398, 426, 78 L.Ed. 413, 422;
Wilson v. New, (1917) 243 U.S. 332, 348, 61
L.Ed. 755, 773;

Louisville Joint Stock Land Bank v. Radford,
(1935), 295 U.S. 555, 79 L.Ed. 1593;

Terry v. Anderson, (1877), 95 U.S. 628, 24 L.Ed. 365;

Ex parte Milligan, (1866), 4 Wall. 2, 18 L.Ed. 281.

These cases clearly establish the proposition that no matter how pressing the emergency, no matter how extreme the requirements of the Nation may be, Congress may not exercise an authority which is forbidden to it by the Constitution. And in these cases, the Court was faced with legislative efforts to deal with situations far more fraught with danger to the public interest than were presented by the congressional recitals in the Portal-to-Portal Act of 1947, even if those recitals were accepted at their full face value.

The Supreme Court was unequivocal in *Louisville Joint Stock Land Bank v. Radford*, *supra*, when it said that "the Fifth Amendment commands that *however great the nation's need*, private property shall not thus be taken *even for a wholly public use* without just compensation." (Emphasis added.) It was unequivocal in *Terry v. Anderson*, 95 U.S. 628, 24 L.Ed. 365, when it held that remedial legislation, but *not* the impairment of the obligation of a contract or the destruction of a vested right, was called for in a situation where "the business interests of the entire people of the State had been overwhelmed by a calamity common to all," where "society demanded that extraordinary efforts be made to get rid of old embarrassments and permit a reorganization upon the basis of a new order of things."

But nowhere was this principle more forcefully stated than in *Ex parte Milligan, supra*. There it was held that not even the emergency of war for the survival of the Union could justify the invasion of the rights protected by the Constitution. The Court solemnly declared:

“* * * Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads direct to anarchy or despotism.* * * *” (Emphasis added.)

However, conceding *arguendo* that the so-called Portal-to-Portal claims did confront the Country with a national emergency which justified drastic action on the part of Congress, there is an important difference between Public Law 177 and the Portal-to-Portal Act. Public Law 177 contains no finding of an emergency, as does the Portal Act, and of course there could be no such a finding.

CONCLUSION.

We submit, therefore, that the retroactive provision of Public Law 177 is clearly unconstitutional and that it is therefore the duty of this Court to so hold.

Dated, San Francisco, California,
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**In the United States Court of Appeals
for the Ninth Circuit**

DUANE MOSS, ET AL., APPELLANTS

v.

HAWAIIAN DREDGING CO., APPELLEES

MARTIN H. LARSEN, ET AL., APPELLANTS

v.

FLOOD BROS., A CORPORATION, ET AL., APPELLEES

CONSOLIDATED CASES, HEREBY REFERRED TO AND MADE A PART
HEREOF BY NUMBER:

Nos. 25300, 25301, 25302, 26061, 26062, 26063, 26064, 26065,
26066, 26067, 26068, 26069, 26070, 26071, 26072, 26073,
26074, 26075, 26076, 26077, 26078, 26242, 26243, 26245,
26247, 26535, 26536, 26537, 27001, 26919.

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12,571

DUANE MOSS, ET AL., APPELLANTS

v.

HAWAIIAN DREDGING CO., APPELLEES

MARTIN H. LARSEN, ET AL., APPELLANTS

v.

FLOOD BROS., A CORPORATION, ET AL., APPELLEES

CONSOLIDATED CASES, HEREBY REFERRED TO AND MADE A PART
HEREOF BY NUMBER

BRIEF ON BEHALF OF APPELLEES

COUNTER STATEMENT OF CASE

It is our understanding that the single issue to be argued at this time is the constitutionality of P. L. 177 and P. L. 393, 81st Congress, 1st Session;¹ and that the limitation of the

¹ P.L. 393, which is commonly called "Fair Labor Standards Act Amendments of 1949", and which deals with many matters in addition to overtime, was under consideration by the 81st Congress at the time it enacted P.L. 177. The provisions of Sections 7(d)(6) and 7(d)(7) of P.L. 393 are the same, in substance, as the provisions of Section 1 of P.L. 177. Section 16(e) of P.L. 393 is the same, in substance, as Section 2 of P.L. 177. P.L. 177 was repealed by Section 16(f) of P.L. 393, which, however, reenacted P.L. 177 as

hearing to this issue is pursuant to an oral stipulation of appellants' counsel that in the event of a decision sustaining the constitutionality of these statutes judgments may be entered for the defendants in all the consolidated cases. See Transcript, pp. 70, 74, 75.

Pages 5 to 21 of appellants' brief are devoted to what is called "Background and Preliminary Considerations". Many of the statements therein are incorrect, or are but misleading segments of the evidence.² Similar inaccurate

above stated. The full text of P.L. 177 and of applicable sections of P.L. 393 appear at pages 18 to 21 of the Appendix of this brief. The House and Senate Committee reports on P.L. 177 appear beginning at page 21 and page 28, respectively, of the Appendix.

² For example:

(a) At pages 5 and 6 it is said that the longshore industry has never operated on a "regular basis so far as daily hours of work are concerned", and that work at all hours of the day and on all days of the week is the same, except that work at night or on Sundays and holidays is more "dangerous, difficult and unpleasant" and carries a higher rate only for this reason. Hence—it is said at pages 8 and 9—all rates are regular rates; and there is no such thing as overtime in the longshore industry (see fn. 2, p. 7). Presumably appellants' purpose in making these statements is to lay a basis for arguing that the Congressional action was an outrageous reversal of existing concepts. That there is a normal working day in West Coast longshoring, and that all hours outside the normal day have long been regarded as true overtime hours, was the conclusion of the Senate Committee after extended hearings which included testimony of appellants' counsel. See pages 30-32, 41 of Appendix hereof. The evidence in our trial called for the same conclusion. Cf. dissenting opinion in *Bay Ridge Operating Co. v. Aaron*, 334 U. S. 446.

(b) At page 20 it is said that F.L.S.A. as originally enacted was "clear and unambiguous". To the contrary, see the statement of the Senate Committee (pp. 29, 40, *infra*) that "basically, the problem stems from the failure of the Congress to include in F.L.S.A. any definition of 'regular rate' of pay".

(c) At pages 12 to 15 an attempt is made to lead the Court to believe that the employers and government contracting agencies were utterly indifferent to the opinion of the Wage and Hour Administrator, and wilfully disregarded clearly established law. That this is not so appears from what the Senate Committee found (see pp. 33, 38, *infra*), and would be equally clear if the evidence in the present cases were read.

(d) At various places (see pp. 6, 7, 11, 16, 18) it is stated that the Supreme Court decision in the *Bay Ridge* case established the right of all longshoremen (not only on the East Coast but also in

statements occur in appellants' "Summary of Argument" on pages 4 and 5,³ and at various points in the "Argument".⁴

If these statements are intended to lay a foundation for an argument that P. L. 177 and P. L. 393 are inapplicable to the employment practices in the instant cases, they are improper as in derogation of the stipulation above referred to.

If the statements purport to be a compliance with this Court's rule 20(e), requiring a statement of "the manner in which the questions [to be presented] arise", it is, to say the least, unfortunate that they are inaccurate.

To the extent that the factual and legal situation existing at the time of the enactment of the legislation might be thought relevant to the constitutional question, we believe the Court should look to the findings and statements of the House and Senate Committee, which appear at pages 21 and 28 of the Appendix of this brief. To attempt to determine the factual and legal situation by reference to the evidence and exhibits in the instant case would involve the Court in a great variety of disputes and arguments all of which we had supposed were set aside pending decision of the constitutional question.

the present cases) to a recovery. If we should ever reach a discussion of the applicability of that decision to West Coast practices, vital distinctions between East and West Coast contracts would at once appear. Furthermore, the Supreme Court's mandate referring the cases back to the District Court authorized "any amendments to the complaint or answer or any further evidence that the District Court may consider just". The cases have been retried and are under advisement. Evidence and arguments were presented in support of the position that recovery was precluded even under the Supreme Court decision.

³In the Summary of Argument (pp. 4, 5) appellants assert that their rights had become "vested" because the *Bay Ridge* decision finally and conclusively established their right to a recovery. This is not so. See fn. 2(d).

⁴As to the statement at page 27 that appellants' rights had "matured" and "become vested" and "acquired", cf. fn. 2(d).

The statement at page 47 that P.L. 177 was not based on the same type of situation which prompted the enactment of the Portal-to-Portal Act flies in the face of the declarations of the Senate Committee appearing at pp. 36-40, *infra*.

SUMMARY OF ARGUMENT

Seventeen decisions in nine Circuit Courts of Appeals, including the decision of this Court in the case of *Lassiter, et al. v. Guy F. Atkinson*, 176 F. (2d) 984, have upheld the constitutionality of the retroactive provisions of the Portal-to-Portal Act of 1947. Certiorari has been denied in six of these cases. These decisions are dispositive of the question of the constitutionality of the Fair Labor Standards Act Amendments of 1949 if the legal issues as to constitutionality are the same under the two statutes. The situations leading up to the enactment of the two statutes, and the constitutional issues, are indeed the same, and were so recognized by the Congress. Cf. Appendix, pp. 36-40.

The findings of the Congress that the situation which was to be corrected by the retroactive amendment constituted a substantial burden on interstate commerce and the free flow of goods in commerce, and that it was the congressional purpose to relieve and protect interstate commerce from practices which burden and obstruct it, bring the case within the doctrine that determination of whether need exists for congressional action in a field within the plenary power of Congress, and a decision as to the extent and efficacy of the means to be adopted, are legislative functions over which the Courts have no control except in rare and extraordinary situations such as do not exist in the present case.

Apart from the precedential significance of the Portal Act decisions, it is clear that the Fair Labor Standards Act Amendments of 1949 are not unconstitutional, since the statute is an exercise of sovereign powers under the commerce clause, falling short of an outright taking of property; and such an exercise of sovereign power is not precluded by the fact that there will result a disruption of existing contractual relations or even a complete destruction of the benefits or value of contracts. Contracts, however expressed, cannot fetter the constitutional authority of Congress. When they deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from

the reach of dominant constitutional power by making contracts about them.

This is particularly true where the rights in question are created by, and conferred on private persons by, a statute passed in the exercise of plenary powers in aid of a dominant public interest. Rights thus created are not invalidated by the fact that they may affect or be in derogation of contractual arrangements existing at the time of their creation. Similarly, legislative modification of such rights is not prohibited by the circumstance that the modification affects arrangements made pursuant to the original enactment.

THE ACT OF JULY 20, 1940, PUBLIC LAW 177, 81ST CONGRESS, 1ST SESSION, AND THE ACT OF OCTOBER 26, 1949, PUBLIC LAW 393, 81ST CONGRESS, FIRST SESSION, COMMONLY CALLED "FAIR LABOR STANDARDS ACT AMENDMENTS OF 1949", ARE CONSTITUTIONAL.

It is assumed that this Court adheres to its decision in *Lassiter v. Guy F. Atkinson Co.*, 176 F. (2d) 984, upholding the constitutionality of the Portal-to-Portal Act of 1947.⁵ This disposes of problems relating to P. L. 177 &

⁵ A like result was reached in eight other circuits in the following cases:

Manofsky v. Bethlehem-Hingham Shipyards, Inc. (CCA 1), 177 F. (2d) 529;

Battaglia v. General Motors Corp. (CCA 2), 169 F. (2d) 254, certiorari denied, 335 U.S. 887;

Darr v. Mutual Life Insurance Co. (CCA 2), 169 F. (2d) 262, certiorari denied, 335 U.S. 871;

Thomas v. Carnegie-Illinois Steel Corp. (CCA 3), 174 F. (2d) 711;

Seese v. Bethlehem Steel Co. (CCA 4), 168 F. (2d) 58;

Cingrigrani v. B. H. Hubbert & Son, Inc. (CCA 4), 168 F. (2d) 993, certiorari denied, 335 U.S. 868;

Fisch v. General Motors Corp. (CCA 6), 169 F. (2d) 266, certiorari denied, 335 U.S. 902;

Newsom v. E. I. du Pont de Nemours & Co. (CCA 6), 173 F. (2d) 856, certiorari denied, 338 U.S. 824;

Rogers Cartage Co. v. Reynolds (CCA 6), 166 F. (2d) 317;

Busch v. Wright Aeronautical Corp. (CCA 6), 174 F. (2d) 322;

Lee v. Hercules Powder Co. (CCA 7), 171 F. (2d) 950;

Bumpus v. Remington Arms Co. (CCA 8), July 6, 1950, 9 WH Cases 484;

Role v. J. Neils Lumber Co. (CCA 9), 171 F. (2d) 706;

P. L. 393 if the situation with respect to them, and the legal issues as to their constitutionality, are the same as those relating to the Portal Act.

The situations and the resulting issues are indeed the same. The following quotation from Senate Report No. 402 with respect to H. R. 858 shows that the Senate so believed and so found:

“We believe that the overtime-on-overtime claims cannot be distinguished from the claims covered by the Portal-to-Portal Act. In both cases the claims arose under the Fair Labor Standards Act and would not have existed were it not for that law; in both cases, the claims arose by reason of the failure of Congress to define a basic term in that Act—the ‘workweek’ in the portal-to-portal situation and ‘regular rate’ in this overtime-on-overtime situation; in both cases, prosecution of the claims violated the spirit of collective-bargaining agreements; in both cases, the filing of suits was deplored by responsible A. F. of L. officials; in both cases, the collection of claims would unfairly penalize employers who attempted in good faith to comply with the Wages-and-Hours law. Indeed, in every important respect the overtime-on-overtime claims closely parallel the portal-to-portal claims. In our opinion, the factual and legal findings recited in the Portal-to-Portal Act are equally applicable here, and the situation requires the same expeditious and equitable treatment by Congress.”

The findings in Section 1 of the Portal Act, which were thus adopted by reference as applicable to P. L. 177, include those to the effect that the existing situation “constitutes a substantial burden on interstate commerce” and a “substantial obstruction to the free flow of goods in commerce”, and that the amending statute was enacted “to relieve and protect interstate commerce from practices which burden and obstruct it”.

These findings are important for the reason that the determination of whether a need exists for congressional

Potter v. Kaiser Co. (CCA 9), 171 F. (2d) 705;

Adkins v. E. I. du Pont de Nemours & Co. (CCA 10), 176 F. (2d) 661;

McDaniel v. Brown & Root, Inc. (CCA 10), 172 F. (2d) 466.

action in a field within the plenary power of Congress, and decision as to the extent and efficacy of the means to be adopted, are legislative functions over which the Courts have no control except in rare and extraordinary situations.

In *United States v. Darby*, 312 U. S. 100, in the course of its discussion upholding the constitutionality of the Fair Labor Standards Act against the charge that it unconstitutionally interfered with existing employment contracts, the Court said, at page 115:

“The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. *McCray v. United States*, 195 U. S. 27; *Sonzinsky v. United States*, 300 U. S. 506, 513 and cases cited. ‘The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power.’ ”

In *Overnight Motor Co. v. Missel*, 316 U. S. 572, the employer took the position that the *Darby* case went no further than a holding that Congress could legislate against conditions detrimental to a minimum standard of living. It was argued that Congress could not constitutionally regulate rates of pay which were above such a standard, nor hours not injurious to health. The Court held, however, that the decision as to the need or efficacy of legislative enactments in aid of interstate commerce was the function of the Congress and not of the Courts, saying, at page 577:

“If, in the judgment of Congress, time and a half for overtime has a substantial effect on these conditions, it lies with Congress’ power to use it to promote the employees’ well-being.”

Similarly in *Bunting v. Oregon*, 243 U. S. 426, where the issue was whether a State law regulating hours of labor in mines violated the Fourteenth Amendment, the Court said, at pages 437-438:

“But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of

the wisdom of its exercise. *Rast v. Van Denman & Lewis Co.*, 240 U. S. 342, 365. It is enough for our decision if the legislation under review was passed in the exercise of an admitted power of government; and that it is not as complete as it might be, not as rigid in its prohibitions as it might be, gives perhaps evasion too much play, is lighter in its penalties than it might be, is no impeachment of its legality.”

It is true that where contract rights are interfered with by a legislative enactment which is justified as an exercise of the police power or solely on the basis that the contract is charged with a public interest, the recitals in the legislation are not conclusive, and the Courts can examine into the facts to see whether the legislature has transgressed the limits of its powers. But the existence of an emergency is not a condition precedent to the right to exercise the police power or constitutional powers (*Veix v. Sixth Ward Assn.*, 310 U. S. 32, 38-40); and the burden of establishing invalidity is on the attacking party (*Weaver v. Palmer Bros.*, 270 U. S. 402, 410; *Minnesota Rate Cases*, 230 U. S. 352, 452); and the Courts are without power to strike down the legislation except on overwhelming proof of complete inappropriateness and unjustifiability of the statute. The true doctrine is stated by Chief Justice Hughes in *Norman v. B & O RR Co.*, 294 U. S. 240. After having established the basic principle that Congress may regulate the currency even at the expense of contractual commitments and rights, he came to the point now under discussion—namely, the right or power of the Courts to pass upon the need or appropriateness of the legislation. At page 311 he said:

“Despite the wide range of the discussion at the bar and the earnestness with which the arguments against the validity of the Joint Resolution have been pressed, these contentions necessarily are brought, under the dominant principles to which we have referred, to a single and narrow point. That point is whether the gold clauses do constitute an actual interference with the monetary policy of the Congress in the light of its broad power to determine that policy. Whether they may be deemed to be such an interference depends upon

an appraisalment of economic conditions and upon determinations of questions of fact. With respect to those conditions and determinations, the Congress is entitled to its own judgment. We may inquire whether its action is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decisions of the Congress as to the degree of the necessity for the adoption of that means, is final."

Continuing at page 313, he indicated the narrow limits of the Court's function in the following language:

"Can we say that this determination is so destitute of basis that the interdiction of the gold clauses must be deemed to be without any reasonable relation to the monetary policy adopted by the Congress?"

In the light of these pronouncements we turn to a statement of various facts which to us clearly show that the situation confronting the Congress was not so destitute of relationship to the well-being of interstate commerce as to empower the Court to interfere.

(a) Following the Supreme Court decision of June 7, 1948 in *Bay Ridge Operating Co. v. Aaron*, 334 U. S. 446, and as the date of expiration of the existing longshoremen's collective bargaining agreement in New York drew near, the employers and union found themselves unable as a practical matter to adjust the industry to the decision. A costly strike followed. A Board of Inquiry appointed by the President under the Labor Management Relations Act of 1947 reported the reality and sincerity of the impasse. A temporary arrangement was finally reached to bridge the gap until such time as remedial legislation might be enacted as recommended by the United States Department of Labor ("Hearings before Subcommittee of the Committee on Labor and Public Welfare, U. S. Senate, 81st Cong., 1st Sess. on S. 336 and H. R. 858," pp. 33-36, 554; cf. also letter of Secretary of Labor at p. 2).

(b) The same problem existed in other industries having similar types of contract (S. Rep. No. 402 on H. R. 858, pp. 21, 28, *infra*); and enactment of the amendment was advo-

cated, through personal appearances or letters, by a large number of industries other than longshoring. The statements and letters emphasize that clock-hour arrangements similar to that involved in the *Aaron* case exist in these other industries; that the construction placed on F.L.S.A. by the *Aaron* decision was not welcomed by either employers or employees in these industries; that attempted adjustments to meet the decision disrupted long-established and satisfactory collectively bargained agreements; that satisfactory adjustments were always difficult, and not infrequently quite impracticable; and that employers and employees had believed that their contracts met the requirements of F.L.S.A. as interpreted in Wage & Hour Administration's Interpretative Bulletin No. 4.⁶

(c) The potential liability under the Supreme Court decision in the *Aaron* case, *supra*, was estimated as high as \$300,000,000 in the longshore industry (S. Rep. 402, p. 28, *infra*; and statements by Supreme Court, 334 U.S. at fn. 1, p. 454), and as "substantial" in other industries (S. Rep. 402, p. 29, *infra*).

(d) Not less than 137 cases brought on behalf of longshoremen were instituted between June 1943 and June 1947. Not less than 200 additional suits were instituted shortly after the decision of the Court of Appeals for the Second Circuit, in the *Aaron* case.

(e) The Senate Subcommittee held extended hearings resulting in a record of 826 printed pages.⁷ They heard at

⁶ See Hearings before Senate Committee: Edison Electric Institute and other electric light and power companies (pp. 83, 117, 119, 194, 195); brewers (pp. 183, 194); Lumber Manufacturers Ass'n (pp. 181, 625); refrigerator and warehouse companies (pp. 190, 195, 613, 627); meat packers (pp. 123, 623); bakers (p. 401); Cotton Compress & Warehouse Ass'n (p. 335); machinery manufacturers (pp. 196, 615); gas companies (pp. 195, 618); plasterers, lathers and other building trades and general contractors (pp. 194, 610, 616); theaters (p. 194); candy makers (p. 605); sand and gravel and concrete mix (p. 605); printers (p. 613); paper manufacturers (p. 614); orchardists (p. 616); glass manufacturers (p. 621); ropes makers (p. 627); garment manufacturers (p. 629); grocery companies (p. 628).

⁷ Entitled: "Hearings Before a Subcommittee of the Committee on Labor & Public Welfare, United States Senate, 81st Congress, 1st

length from employers and employees and Government officials; from counsel for plaintiffs in the pending East and West Coast longshoremen cases; and from representatives of C.I.O., A.F.L. and International Longshoremen's Association; and received a large amount of documentary material.

(f) There was no opposition to an amendment having prospective operation. Retroactivity "was opposed principally by counsel for claimants who have instituted suits to recover so-called 'overtime on overtime' "; and by C.I.O. A.F.L. did not oppose. The International Longshoremen's Association "strongly suggested the need of such relief." The bill originally had been limited to longshoring and the construction trades. There was "no serious objection" to broadening the bill to cover industry generally (S. Rep. 402, pp. 30, *infra*).

(g) The reasons for the retroactive provision which were regarded by the committee as impelling include all those stated in Section 1 of the Portal Act as the basis for that legislation—namely, windfall payments in derogation of bona fide collective-bargaining agreements; the inequity of penalizing employees who stood by their agreements, and employers who acted in good faith; the fact that the claims sprang from the wartime exigencies; the absence of notice from the Wage and Hour Administrator that the practices were illegal; the filing of suits deplored by A.F.L.; and the serious financial consequences of a failure to legislate. The committee concluded that "the overtime-on-overtime claims cannot be distinguished from the claims covered by the Portal-to-Portal Act" (S. Rep. 402, pp. 36-40, *infra*).

(h) It was the intent of Congress to destroy pending overtime-on-overtime claims in the longshore industry and in other industries under similar contracts and practices. (S. Rep. 402. See also debate on concurrence in the House of Representatives set forth in Congressional Record July 14, 1949, pp. 9670, 9671, 9674, 9677, 9679.)

Session on S. 336 and H. R. 858." A copy was sent to the court in connection with the case of *Biggs v. Joshua Hendy Corporation*, No. 12257.

(i) In response to an inquiry from the Committee, Mr. McComb, the present Wage and Hour Administrator, stated (Hearings before Subcommittee, p. 291) :

“The position of the former Administrator with respect to premium rates of time and one-half for work performed on holidays, Saturdays, or Sundays was that such premiums were overtime pay and could be offset against any amounts required to be paid for overtime work by the Fair Labor Standards Act.”

(j) The 1947 Annual Report of the Wage and Hours Public Contracts Division of the Department of Labor contained the following statement (Hearings before Subcommittee, p. 494) :

“There are many other supplementary pay arrangements, however, which do not appear to undermine the overtime requirements of the act and which are considered advantageous by both management and labor. These include certain types of profit-sharing plans and arrangements for time and one-half pay or better for work during specified hours of the day, or days of the week. The very purpose and desirability of such pay arrangements are frequently defeated by the requirement that such payments must be included in the regular rate of pay in computing overtime compensation. Some modification of the term ‘regular rate of pay’ appears to be necessary to permit the utilization of such arrangements in industry within the framework of the Fair Labor Standards Act without at the same time opening the gates for the widespread evasion of the intent of Congress.”

(k) On February 18, 1949, the Secretary of Labor wrote the Committee in part as follows (Hearings before Subcommittee, p. 2) :

“The Department of Labor favors prompt enactment of legislation such as is contained in S. 336 in order to remove serious difficulties in the maintenance of desirable labor standards arrived at through collective-bargaining agreements, and in order to prevent labor disputes in the industries affected by the proposed legislation. Expeditious action on this measure is necessary at this time in order to eliminate the im-

minent possibility that such disputes may occur when existing temporary arrangements in the longshore and stevedoring industries to meet the problem expire."

In the face of the foregoing, it is hard to see how any Court could question the sincerity or correctness of the Congressional finding that enactment of P.L. 177 was necessary "to relieve and protect interstate commerce from practices which burden and obstruct it." Surely it cannot be said that there was no "reasonable relationship" between the existing situation and the well-being of interstate commerce. This being so, there is an end to the power of the Court to further consider or review the justification for the legislation.

We turn now to discussion of the basic issue of the constitutional limits of Congressional legislative power.

We believe that the problem has been confused at times by arguments which deal with the matter as one of confiscation of rights, when in reality no confiscation is involved.

There are a host of cases making it too clear to be questioned any longer that the exercise of sovereign powers in a manner not involving an outright taking of property for Government use is not precluded by the fact that there will result a disruption of existing contractual arrangements or even a complete destruction of the benefits or value of contracts. See, for example, imposition of maximum prices on sales of coal in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381; taking possession and operation of telegraph lines when deemed necessary for the national defense in *Dakota Central Telephone Co. v. South Dakota*, 250 U. S. 163; the suspension of tariff provisions upon findings that the duties imposed by a foreign state are reciprocally unequal and unreasonable in *Field v. Clark*, 143 U. S. 649; the regulation of radio stations according to public interest, convenience and necessity in *National Broadcasting Co. v. United States*, 319 U. S. 190; the prohibition of "unfair methods of competition" not defined or forbidden by the common law in *Federal Trade Commission v. Keppel & Brother*, 291 U. S. 304; and the allocating of marketing quotas among the states and producers in *Mulford v. Smith*,

307 U. S. 38; imposition of price controls under the Price Control Act of 1942, in *Yakus v. United States*, 321 U. S. 414; nullification of gold clause provisions in corporate bonds, as a result of regulation of the currency, in *Norman v. B&O RR Co.*, 294 U. S. 240; the imposition of a moratorium on foreclosure of mortgages in *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398.

The controlling doctrine is stated by Justice Holmes in *Omnia Co. v. United States*, 261 U. S. 502. In that case the plaintiff had a valuable contract for delivery to him of the entire output of a particular plant, and the contract was wholly nullified by the taking over of the plant by the United States for war purposes. In denying a recovery for the resulting loss the Court said, at page 508:

“The contract in question was property within the meaning of the Fifth Amendment, and if taken for public use the Government would be liable. But destruction of, or injury to, property is frequently accomplished without a ‘taking in the constitutional sense’ ”.

At page 510 the Court said:

“For the consequential loss or injury resulting from lawful governmental action, the law affords no remedy. The character of the power exercised is not material.”

At pages 509-510 the Court quoted with approval the following statements from *Louisville & Nashville R.R. Co. v. Nottley*, 219 U. S. 467, 484:

“It is not determinative of the present question that the commerce act as now construed will render the contract of no value for the purposes for which it was made. In *Knox v. Lee*, 12 Wall. 457, above cited, the court, referring to the Fifth Amendment, which forbids the taking of private property for public use without just compensation or due process of law, said: ‘That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a

draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of the contracts."

In *Norman v. B&O RR*, *supra*, the Court, at page 305, approved the conclusions reached in the legal tender cases, "that contracts must be understood as having been made in reference to the possible exercise of the rightful authority of the Government, and that no obligation of a contract 'can extend to the defeat' of that authority", and that the Fifth Amendment referred only to a "direct appropriation". Passing on to the contention that "Congress is seeking not to regulate the currency, but to regulate contracts, and thus has stepped beyond the power conferred", the Court said, at pages 307-308:

"This argument is in the teeth of another established principle. Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."

In many of the foregoing cases the rights which are interfered with, impaired, or destroyed existed under, and had all the sanctity which attaches to, private contracts. If such rights may be thus affected by exercise of sovereign powers, how much clearer is the power to interfere where, as in the present case, the asserted rights had no independent contractual origin, but had been created solely by an act of the sovereign and therefore presumably could be modified or withdrawn by the sovereign.

That rights created by statute, when not perfected by final judgment, may be destroyed by repeal or modification of the statute was decided in *Coombes v. Getz*, 285 U. S. 434, 447, 448; *Flannigan v. Sierra*, 196 U. S. 553, 560; and *Battaglia v. General Motors* (CCA 2), *supra*. The Supreme Court has clearly indicated its view that rights under

F. L. S. A. fall into this category. In *Brooklyn Bank v. O'Neill*, 324 U. S. 697, they were described as “statutory rights conferred on private parties, but affecting the public interest”; and as “private rights created by federal statute” (pp. 704-705). The refusal of the Court to validate releases was for the very reason that the rights were not subject to control by contract (pp. 707, 708). The right to liquidated damages was said to be merely one part of an entire remedy; and one section, 16(b), was said to “create the obligation for the entire remedy” (p. 711). At page 709 the rights of employees were described as of a “private-public character”, and the Court said that “although this right to sue is compensatory, it is nevertheless an enforcement provision”, in aid of attainment of the objectives of the Act.

The protection of rights fixed by final judgments is based on the policy of necessary repose and quieting of litigation and respect for the judicial branch—considerations which are not present in the present case. It is also to be noted that there is no basis for a claim that plaintiffs’ rights have become “vested” because of an equity arising from a change of position in reliance on F. L. S. A. or its interpretation by the Wage and Hour Administrator or the Courts. The employment arrangement was made in the belief of both sides that it complied with F. L. S. A. In other words, it was not modified to incorporate F. L. S. A. provisions. In Senate Report 402, pp. 39-40; cf. 31, 32, 36, 37, *infra*, attention was called to the fact that all that P. L. 177 really did was to affirm and validate contracts which were acceptable to the parties and which had been interfered with by the construction placed on them by the Supreme Court.

The constitutional power to modify F. L. S. A. surely can be no weaker than the power to superimpose F. L. S. A. on existing contracts at the time of its enactment and thus change existing rights and obligations. In *United States v. Darby*, 312 U. S. 100, and *Opp Cotton Mills v. Administrator*, 312 U. S. 126, the constitutionality of F. L. S. A. was upheld against charges that it violated the Tenth Amendment and the due process clause of the Fifth Amendment, and was an unconstitutional delegation of legislative power to the

Administrator. The constitutional question arose again in *Overnight Motor Co. v. Missel, supra*, where an unsuccessful attempt was made to restrict the application of the statute to minimum wages and hours necessary to good health of employees. The refusal of the Court in *Brooklyn Bank v. O'Neill, supra*, to recognize the validity of settlements and releases for amounts less than the Act called for was an interference with the contracting rights of the parties. Thus the Act interfered with existing contracts in its inception. Since this is lawful, it must be equally lawful to interfere with the relationships which follow the passage of the Act. See, to this effect, the statement at page 577 in the *Missel* case, *supra*, that private contracts, whether before or after the passage of legislation, cannot take overtime transactions from the reach of dominant constitutional power. The subject matter is at all times within the control of the Congress.

CONCLUSION

For all the foregoing reasons, we think it is clear that the Supreme Court has made repeated pronouncements which indicate that its denial of certiorari in the Portal Act cases was because it believed the Circuit Court rulings as to its constitutionality were correct; and that the same reasoning supports the constitutionality of P. L. 177 and P. L. 393.

Respectfully submitted,

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APPENDIX

Act of July 20, 1949, Public Law 177, 81st Congress, 1st Session:

“AN ACT

“To clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended.

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 7 of the Fair Labor Standards Act of 1938, as amended, is amended by adding at the end thereof a new subsection (e), to read as follows:

‘(e) For the purpose of computing overtime compensation payable under this section to an employee—

‘(1) who is paid for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the workweek, at a premium rate not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days, or

‘(2) who, in pursuance of an applicable employment contract or collective bargaining agreement, is paid for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), at a premium rate not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek,

the extra compensation provided by such premium rate shall not be deemed part of the regular rate at which the employee is employed and may be credited toward any premium compensation due him under this section for overtime work.’

“Sec. 2. No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of said employer to pay an employee compensation for any period

of overtime work performed prior to the date of enactment of this Act, if the compensation paid prior to such date for such work was at least equal to the compensation which would have been payable for such work had the amendment made by section 1 of this Act been in effect at the time of such payment."

Act of October 26, 1949, Public Law 393, 81st Congress, 1st Session:

"AN ACT

"To provide for the amendment of the Fair Labor Standards Act of 1938, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the 'Fair Labor Standards Amendments of 1949'.

DECLARATION OF POLICY

"Sec. 2. Section 2(b) of the Fair Labor Standards Act of 1938, as amended, is amended to read as follows:

'(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.'

* * * * *

"Sec. 7. Section 7 of such Act is amended to read as follows:

'Sec. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

'(d) As used in this section the "regular rate" at which an employee is employed shall be deemed to in-

clude all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

* * * *

‘(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or forty in a workweek or in excess of the employee’s normal working hours or regular working hours, as the case may be;

‘(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

‘(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours) where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

* * * *

‘(g) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (d) shall be creditable toward overtime compensation payable pursuant to this section.’

* * * *

[Sec. 16] “(e) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the effective date of this Act), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to July 20, 1949, if the compensation paid prior to July 20, 1949, for such work

was at least equal to the compensation which would have been payable for such work had section 7 (d) (6) and (7) and section 7 (g) of the Fair Labor Standards Act of 1938, as amended, been in effect at the time of such payment.

“(f) Public Law 177, Eighty-first Congress, approved July 20, 1949, is hereby repealed as of the effective date of this Act.”

HOUSE OF REPRESENTATIVES

81st Congress, 1st Session

Report No. 121

CLARIFYING OVERTIME COMPENSATION IN CERTAIN INDUSTRIES UNDER THE FAIR LABOR STANDARDS ACT

February 15, 1949.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. Lesinski, from the Committee on Education and Labor, submitted the following

REPORT

[To accompany H. R. 858]

The Committee on Education and Labor, to whom was referred the bill (H. R. 858) to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the stevedoring and building construction industries and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as so amended do pass.

The amendments are as follows:

(a) Page 1, line 7, after the word “employee” and before the dash, insert “employed in the longshore, stevedoring, building and construction industries”.

(b) Amend the title so as to read:

A bill to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the longshore, stevedoring, building and construction industries.

Statement

Under collective bargaining arrangements antedating the Fair Labor Standards Act of 1938, covering employees in the longshore, stevedoring, building and construction industries, work at straight-time rates has long been limited to specified hours of the day and week which were established in good faith under such agreements as the basic, normal, or regular workday or workweek for such employees. Under these agreements, work outside the basic, normal, or regular workday or workweek has traditionally been considered overtime and has been paid for at an overtime rate providing compensation 50 percent or more in excess of the bona fide rate payable during the basic, normal, or regular workday or workweek. Work performed on Saturdays, Sundays, holidays or on the sixth or seventh day of the workweek was likewise ordinarily made compensable at such contract overtime rates. The same pattern of compensation for employees in these industries was continued in collective bargaining agreements executed since the fair Labor Standards Act of 1938 became effective.

Under the decisions of the Supreme Court of the United States in *Bay Ridge Operating Co. v. Aaron* and *Huron Stevedoring Corp. v. Blue* (335 U. S. 838), handed down on June 7, 1948, it was settled that the premium payments made to longshoremen for Saturday, Sunday, holiday, and night work under such agreements were not true overtime premiums for purposes of the Fair Labor Standards Act but were, rather, payments for work at undesirable hours. As such, the existing provisions of the Fair Labor Standards Act required that they be included in computing the regular rate of such employees and that they could not be credited toward overtime compensation due under the act.

The committee has heard testimony of representatives of labor, management, and the Department of Labor, all of whom are in agreement that the present law, in circumstances such as those considered by the Supreme Court in the Bay Ridge case, is creating serious difficulties in the maintenance of desirable labor standards arrived at through collective bargaining in the longshore, stevedoring, building and construction industries, and that amendment of the act to correct this situation is urgently necessary in order to prevent labor disputes which would seriously burden and obstruct commerce.

The potential effects of the present overtime requirements of the Fair Labor Standards Act on these types of agreements were demonstrated in the negotiation of a new

contract for the east coast longshore industry in the fall of 1948. The inability of the parties to agree on a substitute for their traditional work pattern was an obstacle to settling a crippling strike. The anticipation of prompt legislative action to remedy this situation was one of the factors inducing settlement.

Analysis of H. R. 858

H. R. 858 provides that the following extra compensation shall not be deemed a part of the regular rate at which an employee in the named industries is employed, for purposes of computing overtime compensation under section 7 of the Fair Labor Standards Act of 1938, and may be credited toward overtime payments required by such section:

1. Premium rates for work on Saturdays, Sundays, or holidays or on the sixth or seventh day of the workweek where the premium rate is not less than one and one-half times the rate established in good faith for like work performed during nonovertime hours on other days;

2. Premium rates for work outside of the basic, normal, or regular workday (not exceeding 8 hours) or workweek (not exceeding 40 hours) established in good faith by contract or agreement where the premium rate is not less than one and one-half times the rate established in good faith by contract or agreement for like work performed during such workday or workweek.

The effect of the amendment made by paragraph (1) of the bill may be illustrated by reference to an employee who is paid for work on Saturdays, Sundays, and holidays at a premium rate which is at least one and one-half times the bona fide rate for like work performed during nonovertime hours on other days. The extra compensation for such work provided by the premium rate will, under the amendment, be excluded in computing his regular rate of pay and may be credited toward overtime compensation required by section 7 of the act.

The effect of paragraph (2) of the amendment may be illustrated by reference to provisions typical of the applicable collective bargaining agreements traditionally in effect between employees and employers in the longshore and stevedoring industries on the east and west coasts. These agreements specify straight-time rates applicable during the hours established in good faith under the agreement as the basic, normal, or regular workday and workweek. On the east coast, such workday and workweek are established as 8 hours each day, Monday through Friday, be-

tween the hours of 8 a. m. and 12 noon and 1 p. m. and 5 p. m. On the west coast, such workday and workweek are established as the first 6 hours of work each day, Monday through Friday, between the hours of 8 a. m. and 5 p. m. Work outside such workday and workweek is paid for on both coasts as premium rates not less than one and one-half times the bona fide straight-time rates applicable to like work when performed during the basic, normal, or regular workday or workweek.

Under the amendment, the extra compensation provided by such premium rates will be excluded in computing the regular rate at which employees so paid are employed, and may be credited toward overtime compensation due under the Fair Labor Standards Act. For example, if an employee is paid \$1 an hour for handling general cargo during the basic, normal, or regular workday and \$1.50 an hour for like work outside of such workday, the extra 50 cents will be excluded from the regular rate and may be credited to overtime pay due under the act. As a further example, if the straight-time rate should be higher due to handling dangerous or obnoxious cargoes, in recognition of skill differentials, or for other similar reasons, so as to be \$1.50 during the basic, normal, or regular workday and a premium rate of \$2.25 is paid for such work outside of such workday, the extra 75 cents would similarly be excluded from the regular rate and could be credited toward overtime pay due under the act.

It should be noted that both paragraph (1) and paragraph (2) are limited to rates and work patterns "established in good faith." This phrase is used for the purpose of distinguishing the agreements subject to the bill from fictitious schemes and artificial or evasive devices such as have been condemned in a long line of decisions by the Supreme Court and several circuit courts of appeals, including, to mention a few, *Walling v. Helmerich & Payne* (323 U. S. 37), *Walling v. Alaska-Pacific Consolidated Mining Co.* (152 F. (2d) 812 (C. C. A. 9)), *Robertson v. Alaska Juneau Gold Mining Company* (157 F. (2d) 876), and *Walling v. Youngerman-Reynolds Hardwood Company* (325 U. S. 419). The bill would in no way validate such schemes or devices or affect the principles established by this line of decisions. In this regard it may be pointed out that, in the longshore industry on both coasts, the contractual basic workdays are bona fide arrangements of long standing reflecting the established practice of the parties as contrasted with artificial or fictitious standards.

Because of the history of collective bargaining in the long-shore and stevedoring industries, which has primarily given rise to the need for this amendment, the committee believes it should point out its understanding as to the employees in these industries to whom the bill would apply. The bill, as it affects the longshore and stevedoring industries, is intended to apply to employees who are actually engaged in the handling of water-borne cargoes (which includes baggage, mail, and ships stores) in connection with the loading or unloading of ships and to employees employed by stevedore contractors or steamship companies or ocean freight terminal operators in processes or occupations necessary to the handling of such water-borne cargoes. The bill applies to employees such as car loaders and terminal warehousemen who actually handle water-borne cargoes in connection with the loading and unloading of ships, and employees (such as coopers, watchmen, maintenance workers, and ship clerks) who perform other work in connection with the loading and unloading of ships. Such employees must perform work at marine piers, docks, wharves, terminals, or related storage facilities in order to come within the provisions of the bill. Employees who are not employed by stevedore contractors or steamship companies or ocean freight terminal operators and who may occasionally handle water-borne cargoes, such as truck drivers and drivers' helpers, are not intended to be included within the long-shore and stevedoring industries, for purposes of this bill.

Changes in Existing Law

In compliance with paragraph 2a of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as introduced, are shown as follows (new matter is printed in italics, existing law in which no change is proposed is shown in roman):

Fair Labor Standards Act of 1938, Approved June 25, 1938

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

- (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
- (2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits

or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(e) *For the purpose of computing overtime compensation payable under this section to an employee—*

(1) who is paid for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the workweek, at a premium rate not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days, or

(2) who, in pursuance of an applicable employment contract or collective-bargaining agreement, is paid for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), at a premium rate not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek,

the extra compensation provided by such premium rate shall not be deemed part of the regular rate at which the employee is employed and may be credited toward any premium compensation due him under this section for overtime work.

Calendar No. 391

SENATE

81st Congress, 1st Session

Report No. 402

CLARIFYING OVERTIME COMPENSATION UNDER THE FAIR LABOR
STANDARDS ACT OF 1938, AS AMENDEDMay 18 (legislative day, April 11) 1949—Ordered to be
PrintedMr. HILL, from the Committee on Labor and Public Welfare,
Submitted the Following

REPORT

[To accompany H. R. 858]

The Committee on Labor and Public Welfare, to whom was referred the bill (H. R. 858) entitled "A bill to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the longshore, stevedoring, building, and construction industries," having considered the same, now report the said bill, with amendments, and recommend that said bill, as so amended, do pass.

Statement

This bill is intended as an amendment to section 7 of the Fair Labor Standards Act of 1938 and is designed to correct a situation which has developed in connection with the so-called "clock overtime" or "overtime on overtime" issue. While this problem has arisen in a number of industries in this country, it has assumed particular importance in the longshore and stevedoring industries. In those industries, it has become particularly acute because of the decision of the Supreme Court in the case of *Bay Ridge Operating Co., Inc. v. Aaron* (334 U. S. 446, 1948) and a series of claims instituted in the courts seeking to recover, under the Fair Labor Standards Act of 1938, extra compensation allegedly due by reason of the failure of these industries to compute overtime compensation in compliance with that act. Estimates of the possible liability of industry generally vary substantially. The minimum figure which has been cited for the longshore and stevedoring industries is \$10,000,000, but other estimates for these industries range up to a figure approximating \$300,000,000. In other industries, such as electric and gas utilities, where continuous

operations are essential, the potential liability is undetermined but of a substantial nature.

Basically, the problem stems from the failure of the Congress to include in the Fair Labor Standards Act any definition of "regular rate" of pay. The applicable provisions of that act read as follows:

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

The bill, the adoption of which this committee recommends, would have the effect of furnishing a partial definition of "regular rate" of pay, in that the following extra compensation would not be deemed a part of the regular rate of pay¹ for the purpose of computing statutory overtime and would be creditable toward overtime payments required by the law:

1. Premium rates for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the workweek, where the premium rate is not less than one and one-half the rate established in good faith for like work performed during nonovertime hours on other days;

2. Premium rates for work outside the basic, normal, or regular workday (not exceeding 8 hours) or workweek (not exceeding 40 hours) established in good faith by contract or agreement where the premium rate is not less than one and one-half times the rate established in good faith by contract or agreement for like work performed during such workday or workweek.

Two main questions were raised before your committee. As passed by the House, by a vote of 230 to 7, the bill applied only to future claims and was limited to the longshore, stevedoring, building, and construction industries. There was

¹A full definition of "regular rate" of pay is now being considered by your committee in connection with the over-all revision of the Fair Labor Standards Act proposed in S. 653.

testimony to the effect that the House Committee on Education and Labor was unable to act upon the suggestion that a provision be added giving the bill retroactive effect because, it was claimed, under the rules of the House such a provision would not have been germane since the bill as originally introduced did not cover retroactivity.

In the hearings before your committee, substantial issues were raised as to (1) whether the bill should be made retroactive to protect employers against existing claims for so-called "overtime on overtime" and (2) whether the bill should be broadened to include industry generally, instead of being restricted to the industries mentioned above. A subcommittee heard extensive testimony on both of these points from union and industry spokesmen, from counsel for claimants who have filed suit, and from certain of the executive departments and agencies. At the close of the hearings, briefs were requested by the subcommittee.

At the hearings, the proposal for retroactive validation of the provisions in collective bargaining or other employment agreements conforming to the standards generally agreed upon for future application was opposed principally by counsel for claimants who have instituted suits to recover so-called "overtime on overtime". They were joined in opposition by counsel for the CIO. On the other hand, the retroactive feature was not opposed by the A. F. of L. and, while that organization did not affirmatively support the principle of retroactivity, testimony of the International Longshoremen's Association, the A. F. of L. union principally affected, strongly suggested the need for such relief. The executive departments either supported the proposal for retroactive relief or failed to register any opposition thereto. No serious objection was made to the proposal that the bill be broadened to include industry generally.

Upon a careful consideration of the testimony and briefs, the committee has concluded that the bill should be amended so as to validate past overtime practices under collective bargaining or other agreements, thus avoiding the payment of "overtime on overtime" for the past as well as for the future. We have also concluded that the bill should be made general in its application.

Background

A. The longshore and stevedoring industries

Briefly stated, the problem which has arisen may be illustrated and explained by reference to the pay practices in

the longshore and stevedoring industries. In these industries, as well as others, it has been customary for employers and labor organizations representing the employees to provide by contract that compensation at the rate of one and one-half times the straight-time rate shall be paid for work outside the straight-time hours stipulated in the contract. Thus, in the stevedoring industry the straight-time hours or normal workday has been fixed, on the east coast, from 8 a. m. to 12 noon and 1 p. m. to 5 p. m. weekdays; on the west coast, the first 6 hours of work, exclusive of meal-time, between 8 a. m. and 5 p. m., are the straight-time hours. Work after 5 p. m. and before 8 a. m. in the stevedoring industry on both coasts has been paid at a rate of one and one-half times the straight-time rate for the normal working hours. It should be noted that the payment of this premium rate is not dependent upon the employee having previously worked any specified number of hours, but is based upon the performance of work at particular times which are treated as outside the normal working day. Similarly, on both coasts work on Saturdays, Sundays, and holidays has been paid at the time-and-one-half premium rate without regard to work previously done during the workweek.

These arrangements have been in effect since 1916, when the International Longshoremen's Association made its first collective-bargaining contract with employers in New York. One of the purposes of this arrangement, substantially realized, was to concentrate the work of the longshoremen in the straight-time hours.² The intended effect of such

² The following figures, compiled in Justice Frankfurter's dissenting opinion in the *Bay Ridge case* and based upon the record and lower court findings, indicate the exceptional nature of "overtime" work:

	1932-37 average	Oct. 24, 1938 (effective date of FLSA) to Aug. 31, 1939 (eve of war)	Apr. 1, 1944- Mar. 31, 1945 (height of war- time activity)
Work performed during straight-time hours.....	79.93%	75.03%	54.5%
Night work.....	15.13%	17.89%	20.5%
Week-end work.....	4.94%	7.08%	25.0%
Total night work by men who had worked during same day.....	13.2 %	23.29%	44.5%
Ditto by those who had not.....	86.8%	76.71%	55.5%
Total man-hours, consisting of night work by those who had not worked during same day.....	2.57%	4.17%	11.1%
Concentration of man-hours, straight time over overtime.....	11.22	8.47	3.38

concentration was to bring about the employment of more men as there is pressure for more work to be done in the straight time hours. (See *Bay Ridge Operating Co., Inc. v. Aaron et al.*, 334 U. S. 446, 470.) This arrangement also served to compensate longshoremen for working at undesirable times.

After the enactment of the Fair Labor Standards Act, both parties to the longshore agreements proceeded on the assumption that the employer would receive credit under the act for overtime stipulated in the collective-bargaining agreement for all overtime work, including that work which was performed outside the normal working hours and for which the premium rate of time and one-half was paid. The parties took this position without regard to whether or not payment of this premium rate was premised upon the number of hours previously worked. Indeed, the parties expressly referred in their contract to these payments as "overtime." There is no evidence of any issue being raised with respect to this arrangement and its administration until October of 1943.

Indeed, in December 1938, 2 months after the Fair Labor Standards Act became law, representatives of the industry on the west coast were officially advised by the regional attorney of the Wage and Hour Division that "clock overtime" at one and one-half the contract straight-time rate met the overtime provisions of the act. The inquiry was whether, in computing statutory overtime under labor agreements or company practices which—

fix a straight-time rate and also an overtime rate of pay at one and one-half the straight-time rate, the former being applicable during specified hours of the day, the latter after the expiration of a maximum number of hours specified or at certain times such as at night or on Sundays or holidays—

it was proper to take the view that—

the term "regular rate" as used in the act is the straight-time rate and not the overtime rate.

The regional attorney replied that—

where collective-bargaining agreements or company practices have established a straight-time hourly rate of pay and also an overtime hourly rate of pay at one and one-half times the straight-time rate, the straight-time rate is the "regular" rate, within the meaning of section 7 (a) of the Fair Labor Standards Act.

The Administrator of the Wage and Hour Division consistently held, prior to the Bay Ridge decision, that premium rates for week-end and holiday work of at least one and one-half times the rate paid during the normal or regular working hours were true statutory overtime rates, and hence were to be excluded in computing the "regular rate" for overtime purposes and could be credited against statutory overtime. (See Interpretative Bulletin No. 4, U. S. Department of Labor, Wage and Hour Division, pars. 13, 69, 70.)

By letter dated October 15, 1943, the Administrator of the Wage and Hour Division advised the War Shipping Administration, for the account of which a substantial amount of all stevedoring work was then being done, that the so-called "clock overtime" provided for in labor contracts for work after 5 p. m. did not constitute statutory overtime. He suggested that conferences be held to consider the problem. The effect of this administrative interpretation was to treat the "clock overtime" rate as a part of the "regular rate" of pay which should be used as a basis for calculating the statutory liability for hours worked in excess of 40 hours per week. It also denied to the employer the right to apply the 50 percent premium to any statutory liability arising from working his employees in excess of 40 hours a week. No complaint was made as to the propriety of treating the "contract overtime," rate for week-end and holiday work as statutory overtime. As disclosed in the table cited above, between April 1, 1944, and March 31, 1945, about 45 percent of the work was being performed during contract overtime hours, about equally divided between night work (i. e., after 5 p. m.) and weekend work.

The testimony before this committee reveals that, following this letter, extended conferences were held between the Administrator and the War Shipping Administration as well as other branches of the Government, including the War and Navy Departments, and the Department of Justice. All Government agencies, except the Wage and Hour Division, were of the opinion that the overtime practices of the industry were valid. The Administrator refrained from taking final and formal action on the issue or from attempting to enforce his position through injunctive action, as he had the right to under section 17 of the Fair Labor Standards Act. Government contracting agencies instructed the industry to maintain their normal practices and early in 1945 entered into indemnity agreements protecting the stevedoring companies against liability.

Except for special situations of limited scope in Puerto Rico and Davisville, R. I., the broad issues out of which the Bay Ridge decision resulted developed from litigation instituted in 1945. It is significant to note that, prior to the institution of these suits, the employees were compensated in accordance with the previous understanding of the parties to the collective-bargaining agreement without complaint of either labor organizations or individual employees. The district court ruled against the claimants but was reversed by the circuit court of appeals and the Supreme Court upon appeal. The majority of the Supreme Court, in the Bay Ridge decision, held that the statutory overtime concept was based upon "excessivity" and that the so-called clock overtime provided for in the collective-bargaining agreement therefore did not fall within the statutory concept.

B. Other industries

In industries other than longshore, stevedoring, and building and construction, it has also been a practice of long standing to pay premium rates of time and one-half, pursuant to collective-bargaining agreements for work before or after certain designated hours or for work on week ends and holidays. Thus, a study by the Bureau of Labor Statistics, published in the Monthly Labor Review for October 1947, and based on an analysis of over 400 union contracts covering slightly over 2,000,000 workers in 31 manufacturing and non-manufacturing industries, showed that about half of the agreements contained provisions for premium pay of at least time and one-half for week end and holiday work. More specifically, the Bureau found that (1) over 50 percent of the agreements, "covering over 750,000 workers * * * had provisions requiring penalty rates for work performed on Saturday as such"; (2) "about 60 percent, covering a similar proportion of workers, required penalty rates for Sunday work as such"; (3) "more than four-fifths of all workers in the sample received premium pay for production work on holidays"; and (4) in several industries, including automobiles, cotton textiles, men's clothing, and canning and preserving, agreements specified premium pay of time and one-half for work outside an employee's regular shift. The study further stated that—

more than 80 percent of the workers who received premium pay for Saturday or Sunday as such were paid time and a half for Saturday work and double time for Sunday work,

irrespective of the number of hours previously worked during the week—

while of those paid premium rates for holiday work—two-thirds were paid double time, and a third, time and a half.

It is readily apparent, therefore, that the “overtime on overtime” problem, especially that aspect of it which relates to week-end and holiday work, is of general application.

Testimony presented to your committee by representatives of nonmaritime industries fully substantiates the fact that the “overtime on overtime” problem is not confined to the longshore and stevedoring industries. Mr. Walker Cisler, executive vice president of the Detroit Edison Co., testified that the union contracts of that company, which, of course, operates on a continuous basis, require the payment of time and one-half for work outside scheduled hours. He estimated the potential liability of that company for overtime on overtime at “well over \$1,000,000 annually.” Representatives of other public utilities, such as Cleveland Electric Illuminating Co. and the Wisconsin Public Service Corp., testified in support of the bill. Mr. C. B. Boulet, director of personnel of the Wisconsin Public Service Corp., testified that, based upon his experience as the chairman of the industrial relations committee of the Edison Electric Institute, the problem for utilities generally is serious and merited prompt relief.

In addition, D. W. Tracy, president of the International Brotherhood of Electrical Workers (AFL), the oldest and largest labor organization in the electric utility field, in a formal statement to the committee, said:

I heartily support the legislation which has been proposed for the longshoring stevedoring, and building and construction industries. It is my view, based upon the experience of the brotherhood in dealing with the overtime-on-overtime problem in the many industries of the United States where we represent employees, that there is an equal need for quick action in the electric utility industry prior to the enactment of the general amendments to the wages and hours laws.

Additional evidence before the committee from various industries, including general construction, meat packing, brewing, warehousing, printing, and publishing, makes clear that the perplexing problem of “overtime on overtime” is

not confined to the longshore and stevedoring industries. In consequence, it is apparent that the bill should be of general application, and your committee so recommends.

RETROACTIVITY

The only question remaining for consideration is whether the provisions of this bill should be made retroactive so as to prevent the maintenance of suits now pending or the enforcement of claims which shall have accrued prior to the enactment of this bill.

In considering this question, we have been fully cognizant of the traditional policy against the granting of such relief except under special circumstances. Deviations from this policy, we believe, should not be made lightly, for retroactive relief is an extraordinary remedy.

The issue which the committee has had to resolve was whether the facts establish the special circumstances warranting retroactive relief. We are of the opinion that they do. The considerations prompting this conclusion are as follows:

1. The claims are in the nature of windfalls and in derogation of the collective-bargaining agreements as understood in the past by the contracting parties. The longshore contract involved in the Bay Ridge case specifically stated that all time not denominated straight time "shall be considered overtime and shall be paid for at the overtime rate." Moreover, the denial of retroactive relief would, in effect, penalize the large bulk of employees who have chosen to abide by the terms of the collective agreement. The inequity of allowing such claims to prevail is further aggravated by reason of the fact that the bulk of such claims arose from wartime exigencies which distorted normal work patterns.

2. The premium arrangements, understood by the contracting parties to conform to the statutory overtime requirements, were the result of collective bargaining. There is no evidence that the bargaining was other than at arm's length. It resulted in an arrangement which was highly advantageous to the employees covered by the collective agreement. As the district court found in the Bay Ridge case, there was $8\frac{1}{2}$ times as much contractual overtime as there was overtime measured by the number of hours in excess of 40 worked for one employer. Further, to the extent to which the arrangement was intended to and did spread employment by encouraging the concentration of

work in straight-time hours, it is consistent with one of the main purposes of the maximum hour provision of the Fair Labor Standards Act.

3. The House and Senate reports on the Fair Labor Standards Act strongly support the view that the act was—

intended to aid and not supplant the efforts of American workers to improve their position by self-organization and collective bargaining (H. Rept. No. 1452, 75th Cong., 1st sess., p. 9; S. Rept. No. 884, 75th Cong., 1st sess., pp. 3-4).

4. Without retroactivity, the effect upon many companies that have an important impact upon commerce may be disastrous. As to the longshore industry, estimates of potential liability range from \$10,000,000 to approximately \$300,000,000. It is contended that the Government would assume much of the potential liability. This would appear to be the situation, at least in those areas covered by War Shipping Administration contracts, as a result of the cost-plus-fixed-fee arrangement and the 1945 indemnity agreement. It is questionable, however, whether the same result would follow outside this area, as, for example, contracts with the War Department, which did not contain any cost-plus-fixed-fee provision. It is probable, therefore, that the industry, in the event of successful prosecution of these cases, would not be completely insulated. The evidence presented to your committee reveals that the average stevedore has a net worth of between \$100,000 and \$250,000; that his annual wage bill is between 10 and 15 times his net worth; that collection of claims, adding only 5 percent per annum to his wage bill for only 2 years, will threaten bankruptcy to many of the companies affected. Liability for even a small portion of these claims will threaten the survival of many of these companies.

5. On the basis of the evidence, it seems reasonably clear that prior to 1943, the parties had no notice of their potential liability under the overtime provisions of the Fair Labor Standards Act. Indeed, as early as December 1938, in a letter written by the regional attorney of the Wage and Hour Division in San Francisco, to a representative of the longshore industry, the statement was made that the clock overtime arrangement constituted statutory overtime. This letter was part of the evidence produced in the recent trial of the issue before the Federal district court in California, as part of the good-faith defense under the Portal-to-Portal Act (Public Law 49, 80th Cong.). The court rendered judgment

against the plaintiffs on the basis of this defense. See *Moss v. Hawaiian Dredging Co.*, decided March 30, 1949, Case No. 25299-G, United States District Court, Northern District of California, Southern Division.)

6. Great reliance is placed by opponents of retroactivity upon the position taken by the Wage and Hour Division in 1943 and subsequent thereto. In a letter to the War Shipping Administration, dated October 15, 1943, the Administrator stated that in his view the overtime practice of the longshore industry was in violation of the overtime provisions of the Fair Labor Standards Act. He noted that any change in wage practices of firms operating under contract with the War Shipping Administration required approval of that agency and therefore invited comments and suggestions from it. There followed numerous conferences among interested Government agencies and it was the view of the War Shipping Administration, the Army and Navy, and the Department of Justice, that the Wage and Hour Administrator was wrong in his construction of the act. While the Administrator is vested with responsibility of administering the Fair Labor Standards Act, and consequently his views are to be accorded considerable weight, his judgment is not necessarily infallible. Thus, the Administrator, during this period, continued to uphold the propriety of crediting week end and holiday contract overtime against statutory overtime, although it is to be noted that the Supreme Court subsequently ruled that this practice was likewise erroneous. These circumstances, i. e., the division of view among responsible Government officials, the length of the period during which the parties had observed this practice without issue being raised, and the fact that there was a reasonable question as to the correctness of the Administrator's view, deprive the notice argument of much of its persuasive force.

The committee therefore recommends that the bill include a provision for retroactivity. Precedent for such a retroactive provision is found in the Portal-to-Portal Act. Under section 2 of that act, Congress provided relief against portal-to-portal claims arising out of the Supreme Court decision in the *Mt. Clemens case* (328 U. S. 680). Under section 3 (d) of that act, Congress retroactively validated compromise agreements which had been rendered invalid by the Supreme Court decision in *Schulte v. Gangi* (328 U. S. 108). In section 9, Congress provided for good-faith defense against existing Wage and Hour claims of all kinds in order

to meet the problems resulting from Supreme Court decisions in cases such as *Jewell Ridge Coal Corp. v. Local No. 6167, UMW* (325 U. S. 161), and *Addison v. Holly Hill Fruit Products, Inc.* (322 U. S. 607).

The action of Congress in the Portal Act in meeting the problems arising from these decisions represented a lawful and proper exercise of its legislative functions. Under the Fair Labor Standards Act, the courts are precluded from granting equitable relief, however harsh or oppressive the consequences. "Such matters," the courts have declared, "are for Congress and not for the courts" (*Missel v. Overnight Motor Transportation Co.*, 126 F. (2d) 98, 111, affirmed 316 U. S. 572). (See also *Birbalas v. Cuneo Printing Industries*, 140 F. (2d) 826, 829.)

The constitutionality of the Portal-to-Portal Act has been sustained in more than 100 Federal court decisions, including 10 decisions by 6 different circuit courts of appeal: *Rogers Cartage Co. v. Reynolds*, 166 F. (2d) 317 (C. C. A. 6); *Seese v. Bethlehem Steel Co.*, 168 F. (2d) 58 (C. C. A. 4); *Atallah v. B. H. Hubbert & Son, Inc.*, 168 F. (2d) 993 (C. C. A. 4); *Battaglia v. General Motors Corporation*, 169 F. (2d) 254 (C. C. A. 2); *Darr v. Mutual Life Insurance Company*, 169 F. (2d) 262 (C. C. A. 2); *Fisch v. General Motors Corporation*, 169 F. (2d) 266 (C. C. A. 6); *Role v. J. Neils Lumber Company*, 171 F. (2d) 706 (C. C. A. 9); *Potter v. Kaiser Co.*, 171 F. (2d) 705 (C. C. A. 9); *Lee v. Hercules Powder Company*, 171 F. (2d) 950 (C. C. A. 7); *McDaniel v. Brown & Root, Inc.*, 172 F. (2d) 466 (C. C. A. 10). In every case where an effort was made to secure Supreme Court review of lower court decisions, the Supreme Court has declined to grant certiorari: *Battaglia v. General Motors Corporation*, 335 U. S. 887; *Darr v. Mutual Life Insurance Company of New York*, 335 U. S. 871; *Atallah v. B. H. Hubbert & Son, Inc.*, 335 U. S. 868; *Fisch v. General Motors Corporation*, 335 U. S. 902. In this connection, the following quotation from Judge Parker, speaking for the Circuit Court of Appeals of the Fourth Circuit in *Seese v. Bethlehem Steel Co.* (168 F. (2d) 58, at 64) is especially pertinent:

Looked at in another way, all that Congress has done by the legislation here under consideration is to validate the contracts and agreements between employer and employee which were invalid under the Fair Labor Standards Act by reason of the interpretation placed by the Supreme Court upon that act; and the authority of the legislative body to validate voluntary transactions which at the time they were

have been condemned in a long line of decisions by the Supreme Court and several circuit courts of appeals, including, to mention a few, *Walling v. Helmerich & Payne* (323 U. S. 37), *Walling v. Alaska-Pacific Consolidated Mining Co.* (152 F. (2d) 812 (C. C. A. 9)), *Robertson v. Alaska Juneau Gold Mining Company* (157 F. (2d) 876), and *Walling v. Youngerman-Reynolds Hardwood Company* (325 U. S. 419). The bill would in no way validate such schemes or devices or affect the principles established by this line of decisions. In this regard it may be pointed out that, in the longshore industry on both coasts, the contractual basic workdays are bona fide arrangements of long standing reflecting the established practice of the parties as contrasted with artificial or fictitious standards.

The effect of section 2 of the bill would be to make the provisions of section 1 retroactive so as to prevent the maintenance of suits now pending or the enforcement of claims which may have accrued prior to the enactment of this bill. The intent of section 2 is to treat as overtime premium any portion of the compensation paid in any workweek pursuant to the standards contained in section 1 which was paid prior to the date of enactment at a rate of not less than time and one-half the rate applicable for the same work during nonovertime hours. If any portion of the contractual overtime compensation in any workweek was paid at a rate of less than time and one-half the normal, basic, or regular rate for such work, that portion is not treated as overtime premium.

Changes in H. R. 858

Provisions in H. R. 858 which your committee recommends be omitted are printed in linetype, new matter is printed in italic, and provisions of H. R. 858, in which no change is recommended, are shown in roman.

[H. R. 858, 80th Cong., 1st sess.]

[Omit the part struck through and insert the part printed in italic]

An Act to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the longshore, stevedoring, building and construction industries

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 7 of the Fair Labor Standards Act of 1938, as amended, is amended by adding at the end thereof [a new subsection (e)] * *two new subsections, (e) and (f), to read as follows:*

“(e) For the purpose of computing overtime compensation payable under this section to an employee [employed in the longshore, stevedoring, building and construction industries—] *

(1) who is paid for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the work week, at a premium rate not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days, or

(2) who, in pursuance of an applicable employment contract or collective bargaining agreement, is paid for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), at a premium rate not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek,

the extra compensation provided by such premium rate shall not be deemed part of the regular rate at which the employee is employed and may be credited toward any premium compensation due him under this section for overtime work.”

Sec. 2. No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act) on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to the date of enactment of this Act, if the compensation paid prior to such date for such work to said employee was at least equal to the compensation which would have been payable to said employee for such work had the amend-

* Struck out in copy.

ment made by section 1 of this Act been in effect at the time of such payment.

Passed the House of Representatives February 21, 1949.
Attest:

Ralph R. Roberts, Clerk.

Amend the title so as to read: "An Act to clarify the over-time compensation provisions of the Fair Labor Standards Act of 1938, as amended."

No. 12,571

IN THE

United States
Court of Appeals

For the Ninth Circuit

DUANE MOSS, ET AL.,	<i>Appellants,</i>
vs.	
HAWAIIAN DREDGING CO., ET AL.,	<i>Appellees.</i>
MARTIN H. LARSEN, ET AL.,	<i>Appellants,</i>
vs.	
FLOOD BROS. (a corporation), et al.,	<i>Appellees.</i>

**Motion of Pacific Maritime Association
for Leave to File a Brief as Amicus Curiae.
and
Brief of Pacific Maritime Association as
Amicus Curiae With Appendices**

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IN THE
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Court of Appeals**
For the Ninth Circuit

DUANE MOSS, ET AL.,	<i>Appellants,</i>
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MARTIN H. LARSEN, ET AL.,	<i>Appellants,</i>
VS.	
FLOOD BROS. (a corporation), et al.,	<i>Appellees.</i>

**Motion of Pacific Maritime Association for Leave
to File a Brief as Amicus Curiae**

*To the Honorable, the Judges of the United States Court
Of Appeals for the Ninth Circuit:*

Now comes Pacific Maritime Association and respectfully moves that the Court grant leave to file the annexed brief *amicus curiae*, and that the Court consider it in support of the constitutionality of Section 16(e) of the Fair Labor Standards Amendments of 1949 (29 U.S.C., 216b).

The decision of this constitutional issue is of major significance. A large number of overtime-on-overtime suits are pending in various courts in the continental United States and in the Territory of Hawaii. Many of these in-

volve the longshore and stevedoring industry and seek recovery against members of this Association, whose membership includes virtually all Pacific Coast employers of longshore and stevedoring labor.

Pending in this court is *Duane Moss, et al. v. Hawaiian Dredging Co., et al.*, and consolidated cases, No. 12,571. Other cases, including many being defended by private employers as well as those defended by the United States, are pending in the District Courts in California, Washington and Hawaii. In at least one of these, counsel for the plaintiffs have specifically agreed with counsel undersigned that the complaints may be dismissed if the Overtime-on-Overtime Act is held constitutional.

Respectfully submitted,

GREGORY A. HARRISON,

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Maritime Association.*

IN THE

United States
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Brief of Pacific Maritime Association
as Amicus Curiae

PRELIMINARY STATEMENT

The cases in this appeal involve overtime-on-overtime claims for periods between December, 1942, and August, 1946. Appellants are some 1200 walking bosses and warehousemen employed in the longshore and stevedoring industry in the San Francisco Bay area. Their claims are based on Section 16 of the Fair Labor Standards Act, 29 U.S.C. § 216.

Appellants were all paid in full under their contracts with their employers. This included time and a half overtime pay for all work outside of their basic, normal or regular 30-hour workweek, consisting of the first 6 hours of work between 8:00 A.M. and 5:00 P.M., Mondays through

Fridays. This contract overtime pay (sometimes called "clock overtime" because applicable to certain hours during the day and week) gave these workers the most advantageous overtime conditions held by any group of workers in the country. These are far better than the statutory minimum, which permits 40 hours to be paid for at the straight time rate before overtime premium need be paid. In fact, it has been found that longshoremen's contracts give them $8\frac{1}{2}$ times as much overtime as they would have under the statutory 40-hour rule (Appendix, p. 16).

When the work involved in this appeal was done, the employers believed that payment of overtime in accordance with the high standard of these contracts *ipso facto* fully satisfied the lesser minimum standard of the law. This belief was in good faith and in reliance on rulings of the Administrator of the Wage and Hour Law and other government agencies. (Tr. 53, 54.) This was also accepted by the appellants and the thousands of longshoremen for years (Appendix, pp. 12, 15). Appellants' present claims, which ask additional overtime on top of that so paid, were found by the trial court to be a "species of synthetic afterthought" (Appendix p. 27).

In keeping with the original understanding of the Act, it was amended in 1949 to provide specifically that payment of contract overtime, such as received by appellants, fully satisfies the minimum requirements of the law.

Congressional action became necessary after ideas of pyramiding statutory overtime on top of contractual overtime were conceived and developed. These use the contractual overtime pay as an inflated base for a second level of overtime penalties. Thus has developed the descriptive phrase "overtime-on-overtime." In 1948, long after the work here involved was done, the Supreme Court adopted

its own version of pyramiding.* Appellants claim this entitles them to ripen their windfall claims into judgments although the pyramiding device on which they rely has now been thoroughly discredited and carefully excluded from the law by the 1949 retroactive amendment. The constitutionality of this legislation is the issue now before this Court.

The District Court judgment denying these claims is based on two independent grounds. The first is the good faith defense under the Portal-to-Portal Act of 1947 (Public Law 49, 80th Congress, C. 52; 61 Stat. 84; 29 U.S.C., §§ 251-262); the trial court held that the defendants had relied in good faith upon administrative rulings of the Administrator of the Fair Labor Standards Act and of other government agencies and in good faith followed the pay practices approved by such rulings in paying appellants contractual overtime without overtime-on-overtime (Tr. 53). The second ground relied on by the trial court is the Overtime-on-Overtime Act; the trial court held this statute to be a bar to the claims (Tr. 54). Appellants attack the latter ground simply on their claim that this statute is unconstitutional.

The statute attacked is now Section 16(c) of Public Law 393, 81st Congress; 29 U.S.C. § 216b. This reads:

“No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the effective date of this Act), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to July 20, 1949, if the compensation paid prior to July 20, 1949 for such work was at least equal to the compensation which

**Bay Ridge Co. v. Aaron*, 334 U.S. 446.

would have been payable for such work had section 7 (d) (6) and (7) and section 7 (g) of the Fair Labor Standards Act of 1938, as amended, been in effect at the time of such payment."

This is a reenactment of the provision of Section 2 of Public Law 177, 81st Congress. This provision, plus the substantive changes of Section 7 of the Fair Labor Standards Act of 1938 referred to therein, constitute what has become popularly known as the "Overtime-on-Overtime Act."

THE PROCEDURE

The procedure for handling this appeal was determined after preliminary hearing before this court on June 19, 1950. The parties then agreed that a decision sustaining the constitutionality of the Overtime-on-Overtime Act would dispose of this appeal and that thereupon a final judgment could be entered for the appellees. It was also agreed *in distinction to the above* that a decision holding this act unconstitutional would not justify a reversal of the trial court decision, for it could dispose of only one of the separate and complete grounds for the judgment in favor of appellees (Tr. 74, 75). Giving consideration to this agreement, this court ruled that the issue of the constitutionality of the Overtime-on-Overtime Act would first be considered (Tr. 70).

SUMMARY OF ARGUMENT

Unanimity of decision sustains the retroactive modifications of the Fair Labor Standards Act incorporated in the Portal-to-Portal Act. Appellants here ask this court to overrule these decisions and hold a like retroactive modi-

fication of the Fair Labor Standards Act unconstitutional. The cases, however, fully sustain the constitutionality of such legislation as a valid exercise of the power of Congress to regulate commerce. This power authorizes Congress to alter or abolish claims based on the Fair Labor Standards Act at any time before they have ripened into a final judgment.

ARGUMENT

The Legislation and Its History.

The Overtime-on-Overtime Act was intended by Congress to provide a workable assimilation of contractual and statutory provisions for the payment of overtime compensation.

To do this, Congress has provided that there shall be no pyramiding of statutory overtime on top of contractual overtime. Overtime premium payable under a labor contract may be excluded from the computation of the regular rate of pay under the Fair Labor Standards Act and may be credited against any overtime premium due under that Act. With this being assured, employers and labor organizations are free to enter into collective bargaining arrangements to give overtime conditions better than the minimum established by law. This is why organized labor, employers, and the government joined in unanimously expressing the need for this legislation. All agreed that the Supreme Court rule, which deviated from the generally accepted opinion that all "clock overtime" time and a half premium could be credited against statutory overtime and also from the Administrator's opinion that most of this could be credited, was thoroughly unsuited to the needs of commerce. All insisted that the rule should provide that

clock overtime premium required by contract is creditable against statutory overtime premium.¹

The retroactive provision was added in the Senate after exhaustive hearings on the subject. On the basis of these hearings, the Congress concluded that the overtime-on-overtime claims were of the same nature as, and indistinguishable from, the Portal-to-Portal claims and that the flood of overtime-on-overtime claims was a burden on interstate commerce that, like the earlier flood of Portal-to-Portal claims, threatened the free flow of commerce. Following the example of portal-to-portal, another retroactive modification of the Fair Labor Standards Act was enacted to protect commerce. This, the Overtime-on-Overtime retroactive provision, is accordingly in the mold of retroactive modification of the Fair Labor Standards Act used in Section 2(a) and Section 9 of the Portal-to-Portal Act.²

When Congress was considering the retroactive provision, appropriate consideration was given to the claims of appellants. Among the many witnesses appearing before the committee composed of Senators Hill, Withers and

1. The bill passed the House by vote of 230 to 7 (95 Cong. Rec. 1472-1479, February 21, 1949). The findings of the House Committee, that this legislation was necessary because the then existing overtime-on-overtime requirement seriously burdened and obstructed commerce, are set forth in *House Report No. 121, 81st Congress, 1st Session* (accompanying H. R. 858). See particularly that portion printed at p. 3 of the Appendix. Also see *Senate Report No. 402, 81st Congress, 1st Session* (accompanying H. R. 858), particularly paragraphs printed at pp. 14 and 18 of the Appendix.

2. *Senate Report No. 402* adopted the findings of the Portal-to-Portal Act. It further found, "The overtime-on-overtime claims cannot be distinguished from the claims covered by the Portal-to-Portal Act." and, "The situation requires the same expeditious and equitable treatment by Congress." See portions of the *Report* printed at pp. 19 and 20 of the Appendix. The several retroactive modifications of the Fair Labor Standards Act referred to are printed in the Appendix at pp. 21-22.

Morse, was counsel for appellants. Counsel's claim of inequity was presented along with all the other evidence. While it appears that the committee was not impressed with the merits of the argument made by appellants' counsel, in any event the committee's decision as to the over-all issue before it was clear. Its report on retroactive relief recognized the "traditional policy against the granting of such relief except in special circumstances," but spelled out its findings as to the need for relief from overtime-on-overtime as a general rule covering all industry and all cases. Acting on the committee's recommendations, *the Senate adopted retroactivity without any dissent.*³

The Commerce Power and Portal-to-Portal.

The Overtime-on-Overtime retroactive provision is constitutional for the same reasons that sustain these other retroactive modifications of the Fair Labor Standards Act. *It is a proper exercise of the Congressional power to regulate interstate commerce.* This power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . The sovereignty of congress, though limited to specified objects, is plenary as to those objects. . . . The wisdom and the discretion of congress, their identity with the people, and the influence

3. 95 Cong. Rec. 6746, 6747 (May 23, 1949). The relevant portions of *Senate Report No. 402* are printed at pp. 15 to 20 of the Appendix. The House and Senate Reports are printed in full in the appendix to appellees' brief. The testimony and written material submitted by Mr. Resner, counsel for appellants, is reported in *Hearings before a Sub-committee of the Committee on Labor and Public Welfare of the United States Senate Eighty-first Congress First Session on S. 336 and H. R. 858* at 493-540, 595-598.

which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse.”⁴ In the exercise of this power, Congress may use an unreviewable judgment in fashioning remedies to foster and promote commerce by removing burdens and obstructions to its free and uninterrupted flow, and even to prevent commerce from promoting physical, moral or economic evil. “*This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts.*”⁵

The constitutionality of retroactive modifications of the Fair Labor Standards Act is fully established. All the constitutional arguments attacking them have been fully disposed of in several opinions.⁶ So clear is the case, that the later opinions of the Courts of Appeal, including three opinions of this Court, have upheld that the constitutionality of the retroactive modifications without any extended discussion of the arguments.⁷

4. *Gibbons v. Ogden*, 9 Wheat 1, 196, 197.

5. (Italics added) *North American Co. v. Securities & Exchange Commission*, 327 U.S. 686, 705, and cases cited at 705 and 706. See also *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, cases cited at pp. 307-311; *National Carloading Corp. v. Phoenix-El Paso Express, Inc.*, 142 Tex. 141, 176 S.W.2d 564, cert. den. 322 U.S. 747.

6. *Rogers Cartage Co. v. Reynolds*, 166 F.2d 317 (6th Circ.); *Seese v. Bethlehem Steel Co.*, 168 F.2d 58 (4th Circ.); *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Circ.) cert. den. 335 U.S. 887; *Darr v. Mutual Life Ins. Co.*, 169 F.2d 262 (2nd Circ.) cert. den. 335 U.S. 871; *Fisch v. General Motors Corp.*, 169 F.2d 266 (6th Circ.) cert. den. 335 U.S. 902.

7. *Potter v. Kaiser Co.*, 171 F.2d 705 (9th Circ.); *Role v. J. Neils Lumber Co.*, 171 F.2d 706; *Lassiter v. Guy F. Atkinson Co.*, 176 F.2d 984 (9th Circ.); *Atallah v. Hubbert & Co.*, 168 F.2d 993 (4th Circ.), cert. den. 335 U.S. 868 sub nom *Cingrigrani v. Hubbert*;

“Up to now every decision has upheld the constitutionality of the [Portal-to-Portal retroactive] statute. The unanimity of result represents as accurate an expression of the views of the federal judiciary as it is possible to obtain. In addition to this unanimity among District Courts and Courts of Appeals there is the uniform refusal of certiorari by the Supreme Court. We have been taught that a denial of certiorari does not mean Supreme Court approval of a Court of Appeals position. But in this particular situation where there have been eight denials involving the same constitutional question, we think that the series of denials is not without an implicit significance with regard to the Supreme Court’s attitude upon the question involved.”⁸

Despite this unanimity of decision, appellants ask that these cases be *overruled*. Their argument is not that this Court should distinguish the overtime-on-overtime retroactive clause, or its effect, from the several portal-to-portal retroactive modifications of the Fair Labor Standards Act. Their argument, if meritorious, would apply equally to all these retroactive modifications of that Act. In this situation, the trial court concluded, “The issue of constitutionality as raised is not substantial.”⁹

Lasater v. Hercules Powder Co., 171 F.2d 263 (6th Circ.); *Lee v. Hercules Powder Co.*, 171 F.2d 950 (7th Circ.); *McDaniel v. Brown & Root, Inc.*, 172 F.2d 466 (10 Circ.); *Newsom v. E. I. duPont de Nemours & Co.*, 173 F.2d 856 (6th Circ.), cert. den. 338 U.S. 824; *Busch v. Wright Aeronautical Corp.*, 174 F.2d 322 (6th Circ.); *Adkins v. E. I. duPont de Nemours & Co.*, 176 F.2d 661 (10th Circ.); *Manosky v. Bethlehem-Hingham Shipyard*, 177 F.2d 529 (1st Circ.); *Bumpus v. Remington Arms Co.*, 183 F.2d 507 (8th Circ.).

8. *Thomas v. Carnegie-Illinois Steel Corp.*, 174 F.2d 711, 713 (3rd Circ.).

9. Tr. 54, 55.

The Counter-Arguments.

These provisions are retroactive, but it is well established that *retroactive laws are not prohibited by the Constitution in civil cases*. The courts have no power to declare an Act of Congress void upon that ground alone.¹⁰

The retroactive provisions admittedly have affected statutory rights. "What was taken away was the right to recover on claims of purely statutory origin, claims given by statute not as compensation for labor performed but as a means of regulating wages and hours of work in interstate commerce."¹¹ These rights are purely statutory. They are but the incidental product of a regulation of commerce. They are rights of a "private-public character"¹² and so peculiarly subject to modification, control or abolition in the public interest. *Being "purely the creature of statute, they may be altered or abolished by the Congress which established them at any time before they have ripened into final judgment."*¹³

A contention has been made that some statutory overtime pay rights are of a contractual nature. This contention, self-contradictory on its face, is of no consequence

10. *Fisch v. General Motors Corp.*, 169 F.2d 266, 271, 272, **upholding Portal-to-Portal**, citing *Blount v. Windley*, 95 U.S. 173, 180; *Watson v. Mercer*, 8 Pet. 88, 110. See also *Calder v. Bull*, 3 Dall. 386, 390; *Stephens v. Cherokee Nation*, 174 U.S. 445, 477, 478; *Johannessen v. United States*, 225 U.S. 227, 242.

11. *Seese v. Bethlehem Steel Co.*, 168 F.2d 58, 64.

12. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704, 709.

13. *Rogers Cartridge Co. v. Reynolds*, 166 F.2d 317, 321, which was relied upon by this Court in sustaining Section 9 of the Portal-to-Portal Act in *Lassiter v. Guy F. Atkinson*, 176 F.2d 984, 986. See also, **upholding Portal-to-Portal**, *Battaglia v. General Motors Corp.*, 169 F.2d 254, 259; *Fisch v. General Motors Corp.*, 169 F.2d 266, 271: "It is nothing short of a paradox to say that the Congress could not abolish this previously granted right if it concluded that the public interest required a change."

even if it were meritorious. Private persons cannot by contract take themselves outside of the power of Congress to regulate commerce.¹⁴ Every contract has read into it the reservation of essential attributes of sovereign power as the postulate of the legal order.¹⁵ Any contractual arrangements that were initially subject to the commerce power as exercised in the Fair Labor Standards Act must, in turn, be subject to that power if its exercise changes that Act. Such a *statutory change may constitutionally render that contract unenforceable or impair its value*.¹⁶ "The power of the Congress in regulating interstate commerce was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy."¹⁷

Appellants seek to escape this overwhelming body of precedent. With this purpose they call their right to sue for damages under the Fair Labor Standards Act a "vested" right. While their windfall claims have not been reduced to final judgment, they argue that their cause of action is a "vested right, contractual in nature" and that their work was "consideration" "for the right granted by

14. *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 308; *Guaranty Trust Co. v. Henwood*, 307 U.S. 247, 258-259; *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467, 482.

15. *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 435; *Legal Tender Cases*, 12 Wall. 457, 551.

16. *Battaglia v. General Motors Corp.*, 169 F.2d 254, **upholding Portal-to-Portal**, quoting *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467, 482, 485, 486; etc.; concluding, at p. 261: "Clearly the Act did not violate the Fifth Amendment in so far as it may have withdrawn from private individuals, these appellants, any rights they may be said to have had which rested upon private contracts they had made."

See also, **upholding Portal-to-Portal**, on this "contractual right" point, *Darr v. Mutual Life Ins. Co.*, 169 F.2d 262, 266; *Fisch v. General Motors Corp.*, 169 F.2d 266, 270, 271; *Thomas v. Carnegie-Illinois Steel Corp.*, 174 F.2d 711, 713.

17. *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 310.

the statute.”¹⁸ The record, however, belies any contractual or *quid pro quo* character in these claims. The complaints are based on the statute, not a contract.¹⁹ The trial court’s findings show there was no contract to pay overtime-on-overtime: it held that appellants’ claims were a “species of synthetic afterthought”;²⁰ it found that the employers paid the overtime required by contract in the belief that no overtime-on-overtime was payable and that this belief was in good faith and in reliance on rulings of the Wage and Hour Administrator and other government agencies to this effect.²¹ Appellants also offer a legal argument that they have “vested rights” to sue, but this at best is a play on words. Thus, they quote from *Brooklyn Savings Bank v. O’Neil*: “Sole right to bring such suit was vested in the employee.” However, the Supreme Court was saying, not that the right was a “vested” one, but that it was given to the employee rather than to the Administrator.²² Furthermore, cursory examination of the opinion will show that the Court was actually holding that the appellants’ rights are of a character in sharp contrast to “vested” rights. Thus the Court points out that Section 16, on which appellants rely, prescribes compensatory damages that may be

18. Appellants’ Opening Brief, pp. 33, 37. However, it is obvious that the work done was consideration for the contract pay, straight time and overtime, rather than for any “right granted by the statute” to sue for damages under the Fair Labor Standards Act.

19. See paragraphs II and III of the complaints (Tr. 4, 11, 23).

20. Opinion of March 31, 1949 (Appendix, p. 27).

21. Tr. 53, 54.

22. Appellants quote this sentence at p. 34 of their brief. At 324 U.S. 697, 709, the Court stated: “No power was *vested* in the Administrator to bring an action at law to obtain payment of minimum wages left unpaid and to recover damages arising from delay in payment. Sole right to bring such suit was *vested* in the employee under § 16(b). Although this right to sue is compensatory, it is nevertheless *an enforcement provision*.” (Italics supplied.)

recovered in case an employer violates a regulation of commerce. Then, calling Section 16 an "enforcement provision" for effectuating public policy, it holds that the statutory right to sue for damages is so tied up with the public's interest that it cannot be disposed of privately.²³ Obviously a statutory right to sue for specified damages in order to induce compliance with a general regulation of commerce is not a "vested" right. Rather, it is one peculiarly subject to change when Congress finds that recovery of these damages would injure, rather than support, the public interest. Thus, the Sixth Circuit has stated, "Plaintiffs could not expect that their status or rights would remain unchanged through changing circumstances and conditions. They could reasonably anticipate changes in the law. The proposition that their rights granted by the Congress under the commerce clause could not be taken away by congressional legislation under the same clause, is self-contradictory."²⁴

The Supreme Court has authoritatively answered the "vested rights" claim of appellants: "Contracts between private parties cannot create vested rights which serve to restrict and limit an exercise of a constitutional power of Congress."²⁵

Appellants seem to argue that congressional legislation is unconstitutional merely if it causes someone pecuniary loss.²⁶ But the citizen and his property are not so free of

23. See 324 U.S. 697, 704-713.

24. *Fisch v. General Motors Corp.*, 169 F.2d 266, 271, **upholding Portal-to-Portal** against the "vested right" argument. To the same effect: *Seese v. Bethlehem Steel Co.*, 168 F.2d 58, 62-63; *Battaglia v. General Motors Corp.*, 169 F.2d 254, 261.

25. *Guaranty Trust Co. v. Henwood*, 307 U.S. 247, 258-259.

26. At page 42 of their opening brief, appellants summarize the point they discuss at pp. 26 to 42: "The 81st Congress cannot * * * alter rights and obligations which arose during a period in which it had no existence."

governmental power. "No exercise of the legislative prerogative . . . (can be imagined) which will not to some extent abridge his liberty or affect his property."²⁷ Nevertheless Congress may legislate without violating the due process clause. "That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power."²⁸ Thus that clause does not invalidate a congressional statute making unenforceable existing contracts for passes on a railroad, though previously made for good consideration.²⁹ Nor a devaluation statute making unenforceable existing contracts for old dollars though good consideration had been given.³⁰ Nor a statute withdrawing statutory rights,³¹ statutory remedies³² or statutory de-

27. *Nebbia v. New York*, 291 U.S. 502, 525. The Court continued, "The guarantee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

28. *Legal Tender cases*, 12 Wall. 457, 551. See also *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467, 484; *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 305. The distinction is shown by the effect of this clause in cases where the United States has entered a contract for good consideration and tries to escape its obligations under its contract. *Lynch v. United States*, 292 U.S. 571, 579-580 (war risk insurance policies); *Perry v. United States*, 294 U.S. 330, 350-354 (gold clauses).

29. *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467, 482, 484.

30. *Legal Tender cases*, 12 Wall. 457, 547-552; *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 305-310; *Guaranty Trust Co. v. Henwood*, 307 U.S. 247, 258-259.

31. *National Carloading Corp. v. Phoenix-El Paso Express, Inc.*, 142 Tex. 141, 176 S.W.2d 564, cert. den. 322 U.S. 747; *Louisville Bridge Co. v. United States*, 242 U.S. 409, 419-421; *Flanigan v. County of Sierra*, 196 U.S. 553, 560; *Western Union Telegraph Co. v. Louisville & Nashville R. Co.*, 258 U.S. 13; *Norris v. Crocker*, 13 How. 429.

32. *Ex Parte McCardle*, 7 Wall. 506, 508, 514; *The Assessors v. Osborne*, 9 Wall. 567, 575; *Kline v. Burke Construction Co.*, 260 U.S. 226, 234.

fenses.³³ This being the law, surely the Courts of Appeals of nine circuits are correct in holding that the due process clause does not prohibit the exercise of the plenary commerce power to prevent retroactive enforcement of a repealed regulation of commerce that contravenes the public interest.³⁴

Appellants also argue that the retroactive legislation is unconstitutional because the matter of reducing liability under the Fair Labor Standards Act is one solely within the province of the judicial branch. This argument is fully disposed of in the portal-to-portal opinions.³⁵ The issue was clearly a question for Congress rather than for the courts.³⁶

33. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 315-316; *Johannessen v. United States*, 225 U.S. 227, 242; *Ewell v. Daggs*, 108 U.S. 143, 151. Similarly a statutory change in a rule of law may apply to pending cases. *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421, 430-432; *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 40-49; *United States v. Heinszen*, 206 U.S. 370, 387.

34. See the decisions of the nine circuits cited in notes 6, 7 and 8 upholding portal-to-portal. Here too, Congress prevents collection of windfall claims that would enforce an inequitable and repealed statutory interpretation, one which arose out of a technical failure to define statutory terms.

35. *Seese v. Bethlehem Steel Co.*, 168 F.2d 58, 62; *Battaglia v. General Motors Corp.*, 169 F.2d 254, 262; *Fisch v. General Motors Corp.*, 169 F.2d 266, 272.

36. "The action of Congress in the Portal Act in meeting the problems arising from these decisions represented a lawful and proper exercise of its legislative functions. Under the Fair Labor Standards Act, the courts are precluded from granting equitable relief, however harsh or oppressive the consequences. **"Such matters,"** the courts have declared, **"are for Congress and not for the courts"** (*Missel v. Overnight Motor Transportation Co.*, 126 F.2d 98, 111, aff'd 316 U.S. 572). (See also *Birbalas v. Cuneo Printing Industries*, 140 F.2d 826, 829.)" *Senate Report No. 402, 81st Congress, 1st Session* (accompanying H. R. 858); Appendix, p. 19 (emphasis added).

CONCLUSION

The constitutionality of retroactive modifications of the Fair Labor Standards Act, whether Portal-to-Portal or Overtime-on-Overtime, was summed up by the Court of Appeals for the Fourth Circuit in the *Seese* case:³⁷

"The Fair Labor Standards Act did not provide payment for employees engaged in that commerce but means by which wages might be regulated through application of maximum and minimum standards. When it was learned that this instrument of regulation was about to be used in such way as to injure the very commerce that it was designed to help, it is idle to say that Congress was without power to amend it in such way as to avoid the evil that was threatened."

Respectfully submitted,

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37. *Seese v. Bethlehem Steel Co.*, 168 F.2d 58, 63.

(Appendices follow)

Appendix A

81ST CONGRESS }
1ST Session } HOUSE OF REPRESENTATIVES } REPORT
No. 121

CLARIFYING OVERTIME COMPENSATION IN CERTAIN INDUSTRIES UNDER THE FAIR LABOR STANDARDS ACT

FEBRUARY 15, 1949.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

MR. LESINSKI, from the Committee on Education and Labor, submitted the following

R E P O R T

[To accompany H. R. 858]

The Committee on Education and Labor, to whom was referred the bill (H. R. 858) to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the stevedoring and building construction industries and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as so amended do pass.

The amendments are as follows:

(a) Page 1, line 7, after the word "employee" and before the dash, insert "employed in the longshore, stevedoring, building and construction industries."

(b) Amend the title so as to read:

A bill to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the longshore, stevedoring, building and construction industries.

STATEMENT

Under collective bargaining arrangements antedating the Fair Labor Standards Act of 1938, covering employees in the longshore, stevedoring, building and construction industries, work at straight-time rates has long been limited to specified hours of the day and week which were established in good faith under such agreements as the basic, normal, or regular workday or workweek for such employees. Under these agreements, work outside the basic, normal, or regular workday or workweek has traditionally been considered overtime and has been paid for at an overtime rate providing compensation 50 percent or more in excess of the bona fide rate payable during the basic, normal, or regular workday or workweek. Work performed on Saturdays, Sundays, holidays or on the sixth or seventh day of the workweek was likewise ordinarily made compensable at such contract overtime rates. The same pattern of compensation for employees in these industries was continued in collective bargaining agreements executed since the Fair Labor Standards Act of 1938 became effective.

Under the decisions of the Supreme Court of the United States in *Bay Ridge Operating Co. v. Aaron* and *Huron Stevedoring Corp. v. Blue* (335 U.S. 838), handed down on June 7, 1948, it was settled that the premium payments made to longshoremen for Saturday, Sunday, holiday, and night work under such agreements were not true overtime premiums for purposes of the Fair Labor Standards Act but were, rather, payments for work at undesirable hours. As such, the existing provisions of the Fair Labor Standards Act required that they be included in computing the regular rate of such employees and that they could not be credited toward overtime compensation due under the act.

The committee has heard testimony of representatives of labor, management, and the Department of Labor, all of whom are in agreement that the present law, in circumstances such as those considered by the Supreme Court in the Bay Ridge case, is creating serious difficulties in the maintenance of desirable labor standards arrived at through collective bargaining in the longshore, stevedoring, building and construction industries, and that amendment of the act to correct this situation is urgently necessary in order to prevent labor disputes which would seriously burden and obstruct commerce.

The potential effects of the present overtime requirements of the Fair Labor Standards Act on these types of agreements were demonstrated in the negotiation of a new contract for the east coast longshore industry in the fall of 1948. The inability of the parties to agree on a substitute for their traditional work pattern was an obstacle to settling a crippling strike. The anticipation of prompt legislative action to remedy this situation was one of the factors inducing settlement.

This Report is printed in full in the Appendix to Appellees' Brief.

Appendix B

Calendar No. 391

81ST CONGRESS }
1st Session }

SENATE

{ REPORT
No. 402

CLARIFYING OVERTIME COMPENSATION UNDER
THE FAIR LABOR STANDARDS ACT
OF 1938, AS AMENDED

MAY 18 (legislative day, APRIL 11), 1949.—Ordered to be printed

Mr. HILL, from the Committee on Labor and Public Welfare,
submitted the following

REPORT

[To accompany H. R. 858]

The Committee on Labor and Public Welfare, to whom was referred the bill (H. R. 858) entitled "A bill to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the long-shore, stevedoring, building, and construction industries," having considered the same, now report the said bill, with amendments, and recommend that said bill, as so amended, do pass.

STATEMENT

This bill is intended as an amendment to section 7 of the Fair Labor Standards Act of 1938 and is designed to correct a situation which has developed in connection with the

so-called "clock overtime" or "overtime on overtime" issue. While this problem has arisen in a number of industries in this country, it has assumed particular importance in the longshore and stevedoring industries. In those industries, it has become particularly acute because of the decision of the Supreme Court in the case of *Bay Ridge Operating Co., Inc. v. Aaron* (334 U.S. 446, 1948) and a series of claims instituted in the courts seeking to recover, under the Fair Labor Standards Act of 1938, extra compensation allegedly due by reason of the failure of these industries to compute overtime compensation in compliance with that act. Estimates of the possible liability of industry generally vary substantially. The minimum figure which has been cited for the longshore and stevedoring industries is \$10,000,000, but other estimates for these industries range up to a figure approximating \$300,000,000. In other industries, such as electric and gas utilities, where continuous operations are essential, the potential liability is undetermined but of a substantial nature.

Basically, the problem stems from the failure of the Congress to include in the Fair Labor Standards Act any definition of "regular rate" of pay. The applicable provisions of that act read as follows:

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

The bill, the adoption of which this committee recommends, would have the effect of furnishing a partial defini-

tion of "regular rate" of pay, in that the following extra compensation would not be deemed a part of the regular rate of pay¹ for the purpose of computing statutory overtime and would be creditable toward overtime payments required by the law:

1. Premium rates for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the workweek, where the premium rate is not less than one and one-half the rate established in good faith for like work performed during nonovertime hours on other days;

2. Premium rates for work outside the basic, normal, or regular workday (not exceeding 8 hours) or workweek (not exceeding 40 hours) established in good faith by contract or agreement where the premium rate is not less than one and one-half times the rate established in good faith by contract or agreement for like work performed during such workday or workweek.

Two main questions were raised before your committee. As passed by the House, by a vote of 230 to 7, the bill applied only to future claims and was limited to the long-shore, stevedoring, building, and construction industries. There was testimony to the effect that the House Committee on Education and Labor was unable to act upon the suggestion that a provision be added giving the bill retroactive effect because, it was claimed, under the rules of the House such a provision would not have been germane since the bill as originally introduced did not cover retroactivity.

In the hearings before your committee, substantial issues were raised as to (1) whether the bill should be made retro-

1. A full definition of "regular rate" of pay is now being considered by your committee in connection with the over-all revision of the Fair Labor Standards Act proposed in S. 653.

active to protect employers against existing claims for so-called "overtime on overtime" and (2) whether the bill should be broadened to include industry generally, instead of being restricted to the industries mentioned above. A subcommittee heard extensive testimony on both of these points from union and industry spokesmen, from counsel for claimants who have filed suit, and from certain of the executive departments and agencies. At the close of the hearings, briefs were requested by the subcommittee.

At the hearings, the proposal for retroactive validation of the provisions in collective bargaining or other employment agreements conforming to the standards generally agreed upon for future application was opposed principally by counsel for claimants who have instituted suits to recover so-called "overtime on overtime." They were joined in opposition by counsel for the CIO. On the other hand, the retroactive feature was not opposed by the A. F. of L. and, while that organization did not affirmatively support the principle of retroactivity, testimony of the International Longshoremen's Association, the A. F. of L. union principally affected, strongly suggested the need for such relief. The executive departments either supported the proposal for retroactive relief or failed to register any opposition thereto. No serious objection was made to the proposal that the bill be broadened to include industry generally.

Upon a careful consideration of the testimony and briefs, the committee has concluded that the bill should be amended so as to validate past overtime practices under collective bargaining or other agreements, thus avoiding the payment of "overtime on overtime" for the past as well as for

the future. We have also concluded that the bill should be made general in its application.

BACKGROUND

A. The longshore and stevedoring industries

Briefly stated, the problem which has arisen may be illustrated and explained by reference to the pay practices in the longshore and stevedoring industries. In these industries, as well as others, it has been customary for employers and labor organizations representing the employees to provide by contract that compensation at the rate of one and one-half times the straight-time rate shall be paid for work outside the straight-time hours stipulated in the contract. Thus, in the stevedoring industry the straight-time hours or normal workday has been fixed, on the east coast, from 8 a. m. to 12 noon and 1 p. m. to 5 p. m. weekdays; on the west coast, the first 6 hours of work, exclusive of mealtime, between 8 a. m. and 5 p. m., are the straight-time hours. Work after 5 p. m. and before 8 a. m. in the stevedoring industry on both coasts has been paid at a rate of one and one-half times the straight-time rate for the normal working hours. It should be noted that the payment of this premium rate is not dependent upon the employee having previously worked any specified number of hours, but is based upon the performance of work at particular times which are treated as outside the normal working day. Similarly, on both coasts work on Saturdays, Sundays, and holidays has been paid at the time-and-one-half premium rate without regard to work previously done during the workweek.

These arrangements have been in effect since 1916, when the International Longshoremen's Association made its

first collective-bargaining contract with employers in New York. One of the purposes of this arrangement, substantially realized, was to concentrate the work of the longshoremen in the straight-time hours.² The intended effect of such concentration was to bring about the employment of more men as there is pressure for more work to be done in the straight time hours. (See *Bay Ridge Operating Co., Inc. v. Aaron et al.*, 334 U.S. 446, 470.) This arrangement also served to compensate longshoremen for working at undesirable times.

After the enactment of the Fair Labor Standards Act, both parties to the longshore agreements proceeded on the assumption that the employer would receive credit under the act for overtime stipulated in the collective-bargaining agreement for all overtime work, including that work which was performed outside the normal working hours and for

2. The following figures, compiled in Justice Frankfurter's dissenting opinion in the *Bay Ridge case* and based upon the record and lower court findings, indicate the exceptional nature of "overtime" work:

	1932-37 average	Oct. 24, 1938 (effective date of FLSA) to Aug. 31, 1939 (eve of war)	Apr. 1, 1944— Mar. 31, 1945 (height of wartime activity)
Work performed during straight-time hours.....	79.93%	75.03%	54.5%
Night work.....	15.13%	17.89%	20.5%
Week-end work.....	4.94%	7.08%	25.0%
Total night work by men who had worked during same day	13.2%	23.29%	44.5%
Ditto by those who had not.....	86.8%	76.71%	55.5%
Total man-hours, consisting of night work by those who had not worked during same day	2.57%	4.17%	11.1%
Concentration of man-hours, straight time over overtime	11.22	8.47	3.38

which the premium rate of time and one-half was paid. The parties took this position without regard to whether or not payment of this premium rate was premised upon the number of hours previously worked. Indeed, the parties expressly referred in their contract to these payments as "overtime." There is no evidence of any issue being raised with respect to this arrangement and its administration until October of 1943.

Indeed, in December 1938, 2 months after the Fair Labor Standards Act became law, representatives of the industry on the west coast were officially advised by the regional attorney of the Wage and Hour Division that "clock overtime" at one and one-half the contract straight-time rate met the overtime provisions of the act. The inquiry was whether, in computing statutory overtime under labor agreements or company practices which—

fix a straight-time rate and also an overtime rate of pay at one and one-half the straight-time rate, the former being applicable during specified hours of the day, the latter after the expiration of a maximum number of hours specified or at certain times such as at night or on Sundays or holidays—

it was proper to take the view that—

the term "regular rate" as used in the act is the straight-time rate and not the overtime rate.

The regional attorney replied that—

where collective-bargaining agreements or company practices have established a straight-time hourly rate of pay and also an overtime hourly rate of pay at one and one-half times the straight time rate, the straight-time rate is the "regular" rate, within the meaning of section 7(a) of the Fair Labor Standards Act.

The Administrator of the Wage and Hour Division consistently held, prior to the Bay Ridge decision, that premium rates for week-end and holiday work of at least one and one-half times the rate paid during the normal or regular working hours were true statutory overtime rates,

and hence were to be excluded in computing the "regular rate" for overtime purposes and could be credited against statutory overtime. (See Interpretative Bulletin No. 4, U. S. Department of Labor, Wage and Hour Division, pars. 13, 69, 70.)

By letter dated October 15, 1943, the Administrator of the Wage and Hour Division advised the War Shipping Administration, for the account of which a substantial amount of all stevedoring work was then being done, that the so-called "clock overtime" provided for in labor contracts for work after 5 p. m. did not constitute statutory overtime. He suggested that conferences be held to consider the problem. The effect of this administrative interpretation was to treat the "clock overtime" rate as a part of the "regular rate" of pay which should be used as a basis for calculating the statutory liability for hours worked in excess of 40 hours per week. It also denied to the employer the right to apply the 50 percent premium to any statutory liability arising from working his employees in excess of 40 hours a week. No complaint was made as to the propriety of treating the "contract overtime" rate for week-end and holiday work as statutory overtime. As disclosed in the table cited above, between April 1, 1944, and March 31, 1945, about 45 percent of the work was being performed during contract overtime hours, about equally divided between night work (i.e., after 5 p. m.) and week-end work.

The testimony before this committee reveals that, following this letter, extended conferences were held between the Administrator and the War Shipping Administration as well as other branches of the Government, including the War and Navy Departments, and the Department of Jus-

tice. All Government agencies, except the Wage and Hour Division, were of the opinion that the overtime practices of the industry were valid. The Administrator refrained from taking final and formal action on the issue or from attempting to enforce his position through injunctive action, as he had the right to under section 17 of the Fair Labor Standards Act. Government contracting agencies instructed the industry to maintain their normal practices and early in 1945 entered into indemnity agreements protecting the stevedoring companies against liability.

Except for special situations of limited scope in Puerto Rico and Davisville, R. I., the broad issues out of which the Bay Ridge decision resulted developed from litigation instituted in 1945. It is significant to note that, prior to the institution of these suits, the employees were compensated in accordance with the previous understanding of the parties to the collective-bargaining agreement without complaint of either labor organizations or individual employees. The district court ruled against the claimants but was reversed by the circuit court of appeals and the Supreme Court upon appeal. The majority of the Supreme Court, in the Bay Ridge decision, held that the statutory overtime concept was based upon "excessivity" and that the so-called clock overtime provided for in the collective-bargaining agreement therefore did not fall within the statutory concept.

B. Other industries

In industries other than longshore, stevedoring, and building and construction, it has also been a practice of long standing to pay premium rates of time and one-half,

pursuant to collective bargaining agreements for work before or after certain designated hours or for work on week ends and holidays. Thus, a study by the Bureau of Labor Statistics, published in the Monthly Labor Review for October 1947, and based on an analysis of over 400 union contracts covering slightly over 2,000,000 workers in 31 manufacturing and nonmanufacturing industries, showed that about half of the agreements contained provisions for premium pay of at least time and one-half for week end and holiday work. More specifically, the Bureau found that (1) over 50 percent of the agreements, "covering over 750,000 workers * * * had provisions requiring penalty rates for work performed on Saturday as such"; (2) "about 60 percent, covering a similar proportion of workers, required penalty rates for Sunday work as such"; (3) "more than four-fifths of all workers in the sample received premium pay for production work on holidays"; and (4) in several industries, including automobiles, cotton textiles, men's clothing, and canning and preserving, agreements specified premium pay of time and one-half for work outside an employee's regular shift. The study further stated that—

more than 80 percent of the workers who received premium pay for Saturday or Sunday as such were paid time and a half for Saturday work and double time for Sunday work, irrespective of the number of hours previously worked during the week—

while of those paid premium rates for holiday work—

two-thirds were paid double time, and a third, time and a half.

It is readily apparent, therefore, that the "overtime on overtime" problem, especially that aspect of it which relates to week-end and holiday work, is of general application.

Testimony presented to your committee by representatives of non-maritime industries fully substantiates the fact

that the "overtime on overtime" problem is not confined to the longshore and stevedoring industries. Mr. Walker Cislner, executive vice president of the Detroit Edison Co., testified that the union contracts of that company, which, of course, operates on a continuous basis, require the payment of time and one-half for work outside scheduled hours. He estimated the potential liability of that company for overtime on overtime at "well over \$1,000,000 annually." Representatives of other public utilities, such as Cleveland Electric Illuminating Co. and the Wisconsin Public Service Corp., testified in support of the bill. Mr. C. B. Boulet, director of personnel of the Wisconsin Public Service Corp., testified that, based upon his experience as the chairman of the industrial relations committee of the Edison Electric Institute, the problem for utilities generally is serious and merited prompt relief.

In addition, D. W. Tracy, president of the International Brotherhood of Electrical Workers (AFL), the oldest and largest labor organization in the electric utility field, in a formal statement to the committee, said:

I heartily support the legislation which has been proposed for the longshoring stevedoring, and building and construction industries. It is my view, based upon the experience of the brotherhood in dealing with the overtime-on-overtime problem in the many industries of the United States where we represent employees, that there is an equal need for quick action in the electric utility industry prior to the enactment of the general amendments to the wages and hours laws.

Additional evidence before the committee from various industries, including general construction, meat packing, brewing, warehousing, printing, and publishing, makes clear that the perplexing problem of "overtime on overtime" is not confined to the longshore and stevedoring industries. In consequence, it is apparent that the bill should be of general application, and your committee so recommends.

RETROACTIVITY

The only question remaining for consideration is whether the provisions of this bill should be made retroactive so as to prevent the maintenance of suits now pending or the enforcement of claims which shall have accrued prior to the enactment of this bill.

In considering this question, we have been fully cognizant of the traditional policy against the granting of such relief except under special circumstances. Deviations from this policy, we believe, should not be made lightly, for retroactive relief is an extraordinary remedy.

The issue which the committee has had to resolve was whether the facts establish the special circumstances warranting retroactive relief. We are of the opinion that they do. The considerations prompting this conclusion are as follows:

1. The claims are in the nature of windfalls and in derogation of the collective-bargaining agreements as understood in the past by the contracting parties. The longshore contract involved in the Bay Ridge case specifically stated that all time not denominated straight time "shall be considered overtime and shall be paid for at the overtime rate." Moreover, the denial of retroactive relief would, in effect, penalize the large bulk of employees who have chosen to abide by the terms of the collective agreement. The inequity of allowing such claims to prevail is further aggravated by reason of the fact that the bulk of such claims arose from wartime exigencies which distorted normal work patterns.

2. The premium arrangements, understood by the contracting parties to conform to the statutory overtime re-

quirements, were the result of collective bargaining. There is no evidence that the bargaining was other than at arm's length. It resulted in an arrangement which was highly advantageous to the employees covered by the collective agreement. As the district court found in the Bay Ridge case, there was $8\frac{1}{2}$ times as much contractual overtime as there was overtime measured by the number of hours in excess of 40 worked for one employer. Further, to the extent to which the arrangement was intended to and did spread employment by encouraging the concentration of work in straight-time hours, it is consistent with one of the main purposes of the maximum hour provision of the Fair Labor Standards Act.

3. The House and Senate reports on the Fair Labor Standards Act strongly support the view that the act was—

intended to aid and not supplant the efforts of American workers to improve their position by self-organization and collective bargaining (H. Rept. No. 1452, 75th Cong., 1st sess., p. 9; S. Rept. No. 884, 75th Cong., 1st sess., pp. 3-4).

4. Without retroactivity, the effect upon many companies that have an important impact upon commerce may be disastrous. As to the longshore industry, estimates of potential liability range from \$10,000,000 to approximately \$300,000,000. It is contended that the Government would assume much of the potential liability. This would appear to be the situation, at least in those areas covered by War Shipping Administration contracts, as a result of the cost-plus-fixed-fee arrangement and the 1945 indemnity agreement. It is questionable, however, whether the same result would follow outside this area, as, for example, contracts with the War Department, which did not contain any cost-plus-fixed-fee provision. It is probable, therefore, that the

industry, in the event of successful prosecution of these cases, would not be completely insulated. The evidence presented to your committee reveals that the average stevedore has a net worth of between \$100,000 and \$250,000; that his annual wage bill is between 10 and 15 times his net worth; that collection of claims, adding only 5 percent per annum to his wage bill for only 2 years, will threaten bankruptcy to many of the companies affected. Liability for even a small portion of these claims will threaten the survival of many of these companies.

5. On the basis of the evidence, it seems reasonably clear that prior to 1943, the parties had no notice of their potential liability under the overtime provisions of the Fair Labor Standards Act. Indeed, as early as December 1938, in a letter written by the regional attorney of the Wage and Hour Division in San Francisco, to a representative of the longshore industry, the statement was made that the clock overtime arrangement constituted statutory overtime. This letter was part of the evidence produced in the recent trial of the issue before the Federal district court in California, as part of the good-faith defense under the Portal-to-Portal Act (Public Law 49, 80th Cong.). The court rendered judgment against the plaintiffs on the basis of this defense. (See *Moss v. Hawaiian Dredging Co.*, decided March 30, 1949, Case No. 25299-G, United States District Court, Northern District of California, Southern Division.)

6. Great reliance is placed by opponents of retroactivity upon the position taken by the Wage and Hour Division in 1943 and subsequent thereto. In a letter to the War Shipping Administration, dated October 15, 1943, the Administrator stated that in his view the overtime practice of the longshore industry was in violation of the overtime

provisions of the Fair Labor Standards Act. He noted that any change in wage practices of firms operating under contract with the War Shipping Administration required approval of that agency and therefore invited comments and suggestions from it. There followed numerous conferences among interested Government agencies and it was the view of the War Shipping Administration, the Army and Navy, and the Department of Justice, that the Wage and Hour Administrator was wrong in his construction of the act. While the Administrator is vested with responsibility of administering the Fair Labor Standards Act, and consequently his views are to be accorded considerable weight, his judgment is not necessarily infallible. Thus, the Administrator, during this period, continued to uphold the propriety of crediting week end and holiday contract overtime against statutory overtime although it is to be noted that the Supreme Court subsequently ruled that this practice was likewise erroneous. These circumstances, i. e., the division of view among responsible Government officials, the length of the period during which the parties had observed this practice without issue being raised, and the fact that there was a reasonable question as to the correctness of the Administrator's view, deprive the notice argument of much of its persuasive force.

The committee therefore, recommends that the bill include a provision for retroactivity. Precedent for such a retroactive provision is found in the Portal-to-Portal Act. Under section 2 of that act, Congress provided relief against portal-to-portal claims arising out of the Supreme Court decision in the *Mt. Clemens case* (328 U.S. 680). Under section 3 (d) of that act, Congress retroactively vali-

dated compromise agreements which had been rendered invalid by the Supreme Court decision in *Schulte v. Gangi* (328 U.S. 108). In section 9, Congress provided for good-faith defense against existing Wage and Hour claims of all kinds in order to meet the problems resulting from Supreme Court decisions in cases such as *Jewell Ridge Coal Corp. v. Local No. 6167, UMW* (325 U.S. 161), and *Addison v. Holly Hill Fruit Products, Inc.* 322 U.S. 607).

The action of Congress in the Portal Act in meeting the problems arising from these decisions represented a lawful and proper exercise of its legislative functions. Under the Fair Labor Standards Act, the courts are precluded from granting equitable relief, however harsh or oppressive the consequences. "Such matters," the courts have declared, "are for Congress and not for the courts" (*Missel v. Overnight Motor Transportation Co.*, 126 F.(2d) 98, 111, affirmed 316 U.S. 572). (See also *Birbalas v. Cuneo Printing Industries*, 140 F.(2d) 826, 829.)

* * * * *

We believe that the overtime-on-overtime claims cannot be distinguished from the claims covered by the Portal-to-Portal Act. In both cases the claims arose under the Fair Labor Standards Act and would not have existed were it not for that law; in both cases, the claims arose by reason of the failure of Congress to define a basic term in that act—the "workweek" in the portal-to-portal situation and "regular rate" in this overtime-on-overtime situation; in both cases, prosecution of the claims violated the spirit of collective-bargaining agreements; in both cases, the filing of suits was deplored by responsible A. F. of L. officials; in both cases, the collection of claims would unfairly penal-

ize employers who attempted in good faith to comply with the wages-and-hours law. Indeed, in every important respect the overtime-on-overtime claims closely parallel the portal-to-portal claims. In our opinion, the factual and legal findings recited in the Portal-to-Portal Act are equally applicable here, and the situation requires the same expeditious and equitable treatment by Congress.

* * * * *

This Report is printed in full in the Appendix to Appellees' Brief.

*Appendix C*EXCERPTS FROM
TEXT OF PORTAL-TO-PORTAL PAY ACT
OF 1947

SEC. 2. RELIEF FROM CERTAIN EXISTING CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

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SEC. 9. RELIANCE ON PAST ADMINISTRATIVE RULINGS, ETC.

—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

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Appendix D

*In the United States District Court, for the Northern
District of California, Southern Division*

Duane Moss, et al.,

Plaintiffs,

vs.

Hawaiian Dredging Co., et al.,

Defendants.

No. 25299-G.

25300	26068	26242
25301	26069	26243
25302	26070	26245
26060	26071	26247
26061	26072	26535
26062	26073	26536
26063	26074	26537
26064	26075	26919
26065	26076	27001
26066	26077	
26076	26078	

Consolidated Cases, hereby referred to
and made a part hereof by number.

OPINION

GOODMAN, District Judge.

Plaintiffs are approximately 500 longshoremen, known as "walking bosses," and approximately 700 marine terminal warehousemen, who, in 32 cases consolidated for trial, seek recovery from their employers of certain alleged unpaid overtime wages pursuant to §16(b) of the Fair Labor Standards Act of 1938. (29 U.S.C.A. §201 et seq.)

Suits were instituted on behalf of the warehousemen in November of 1945 and related, so far as the claims for payment of overtime are concerned, to the period beginning in November of 1942. Suits on behalf of the longshoremen "Walking bosses" were filed in the summer of 1945 and related to a period commencing in June of 1943.

By the time the cases came to trial in May of 1947, the Portal-to-Portal Act of 1947 (29 U.S.C.A. §251 et seq.) had become effective and the defendants, with the consent of

the Court, amended their answers to plead the special defenses provided for in Sections 9 and 11 of that Act.*¹ At the trial, the main issue litigated was whether or not defendant employers had paid the plaintiffs overtime compensation according to the formula set forth in §7*² of the Fair Labor Standards Act. Defendants contended that the

*1. Section 9 (29 U.S.C.A. 258) provides: "In any action or proceeding commenced prior to or on or after May 14, 1947 based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healy Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."

Section 11 (29 U.S.C.A. 260) provides: "In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216(b) of this title."

*2. Section 7 (29 U.S.C.A. 207) provides: "(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

term "regular rate" in §7(a)(3) meant contract "straight time" rate. The plaintiffs contended that the term "regular rate" must be determined factually by dividing the total compensation received by the total number of hours worked. Evidence was also received at the trial with respect to the special defenses presented under §§9-11 of the Portal-to-Portal Act. Upon the conclusion of the trial in June of 1947, the cause was submitted on briefs to be filed. Respective counsel thereafter obtained, upon stipulation, from time to time, orders extending the time for the filing of briefs, partly for the reason that *Bay Ridge Co. v. Aaron*, 334 U.S. 446, which involved the precise question of the meaning of the term "regular rate" of pay, had reached and was being considered by the Supreme Court. On June 7, 1948, the Supreme Court decided the *Bay Ridge* case and upheld the contention of plaintiffs in this case as to the meaning of "regular rate" of pay. Counsel then proceeded to file further briefs with respect to the special defenses in these cases. Thereafter, plaintiffs moved the Court to reopen the cause for the purpose of receiving further evidence upon the subject of the so-called "good faith" defenses. Upon the hearing of the motion, the evidence sought to be received was heard and the Court reserved ruling on the motion. The Court now grants the motion and the evidence presented is admitted.

After a study of the record and of the Congressional proceedings leading to the enactment of the Portal-to-Portal Act and such authorities as are pertinent,*³ I am

*3. For cases discussing the meaning and application of the term "good faith" as used in sections 9 and 11, see: *Rogers Cartage Co. v. Reynolds*, 6 Cir., 166 F.2d 317; *Reid v. Day & Zimmerman*, 73 F. Supp. 892, affirmed, 8 Cir., 168 F.2d 356; *Jackson v. North-*

convinced that the special defenses have been sustained and that the plaintiffs are not entitled to recover.

No useful purpose will be served by recounting the evidence on these issues. It is sufficient to say that I find that the defendants who were members of the Waterfront Employers' Association relied in good faith upon the administrative rulings of the Administrator of the Fair Labor Standards Act and in good faith followed the pay practices approved by such rulings.*⁴ The evidence adduced after the reopening of the cause even more convincingly sustains the contentions of the defendants. This is for the reason that the Administrator, although appealed to on behalf of complaining employees in other parts of the United States, failed to rule in favor of the pay practices subsequently approved by the Supreme Court in the Bay Ridge case.

Special consideration was given in these causes, in supplemental briefs, to the question as to whether the act of the employers in obtaining indemnifying agreements from the governmental agencies involved, negated the claim of good faith reliance upon the administrative rulings. A study of this question satisfies me that the obtaining of the indemnification agreements in no way evidenced any

west Airlines, 76 F. Supp. 121; Kerew v. Emerson Radio & Phonograph Corp., 76 F. Supp. 197; Burke v. Mesta Mach. Co., 79 F. Supp. 588; Bauler v. Pressed Steel Car Co., 81 F. Supp. 172; Gustafson v. Fred Wolferman, Inc., 73 F. Supp. 186.

*4. The ruling mainly relied upon by defendants was contained in a letter addressed by Miss Dorothy Williams, Regional Attorney for the Wage and Hour Division of the Department of Labor, under date of Dec. 6, 1938, to the Industrial Association of San Francisco, in response to an inquiry made by the Association on behalf of waterfront employers, in which the categorical statement was made that overtime compensation should be calculated on the basis of a percentage of the "straight time" rate of compensation.

lack of reliance upon the administrative rulings. Such might have been the case, if there had been conflicting administrative rulings. For in that event the obtaining of indemnification agreements would be strong evidence of non-reliance. But here the administrative rulings relied upon were non-conflicting and approved the pay practices followed by the defendants. Hence the obtaining of the indemnification agreements can be said to be no more than good business practice on the part of the defendants.*5

The evidence is also convincing that there was good faith reliance by the CPNAB,*6 non-members of the Waterfront Employers' Association, upon administrative rulings which approved the pay practices followed by them.

The humanitarian objectives and purposes of the Fair Labor Standards Act have been consistently and unequivocally recognized and approved by both the Congress and the Courts. But this litigation is a species of synthetic afterthought of a kind which obviously motivated Congress in enacting sections 9 and 11 of the Portal-to-Portal Act of 1947.

In view of the disposition of the cause here made, there is no need to decide the issue raised as to the alleged "executive" status of the "walking bosses."

Judgment will go for the defendants, upon findings to be presented, pursuant to the Rules.

Dated: March 30, 1949.

*5. This precise question was the subject of Congressional discussion. See Congressional Record, Feb. 27, 1947, Vol. 93, pp. 1566 and 1569; May 1, 1947, Vol. 93, pp. 4502, 4516, 4517, and 4577. Cf. *Jackson v. Northwest Airlines*, 76 F. Supp. 121.

*6. CPNAB is descriptive of certain defendants who, as a group, were "Contractors, Pacific Naval Air Bases," engaged in the construction of naval air bases in the Pacific under Navy Contracts.

